SECTION 404 OF THE CLEAN WATER ACT

HEARINGS

BEFORE THE

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ENVIRONMENTAL POLLUTION

OF THE

COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

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SECTION 404 OF THE CLEAN WATER ACT

THURSDAY, JULY 8, 1982

U.S. Senate,
Committee on Environment and Public Works,
Subcommittee on Environmental Pollution,
Anchorage, Alaska.

The subcommittee met at 8 a.m., in room F-278, Anchorage Federal Building, Hon. Frank H. Murkowski, presiding.

OPENING STATEMENT OF HON. FRANK H. MURKOWSKI, U.S. SENATOR FROM THE STATE OF ALASKA

Senator Murkowski. We will call the Subcommittee on Environmental Pollution to order to conduct a hearing on section 404 of the Clean Water Act, wetland permit programs in Alaska.

I want to introduce at this time those with me at the table. On my immediate right, we have Commissioner Ernie Mueller, Department of Environmental Conservation, State of Alaska. Commissioner, it's nice to have you with us this morning.

And next to Ernie on his left is Col. Neil Saling, the District Engineer, U.S. Corps of Engineers, headquartered here in Anchorage, in charge of all Alaska. Colonel Saling, I welcome you to the committee this morning.

I have on my immediate right, Glen Akins, Deputy Commissioner of the Department of Environmental Conservation. Good morning.

On my immediate left, we have John DeVore, who is one of my staff members. We have with us members of the staff of the Environment and Public Works Committee. Also, representatives of some of the Senators on that committee. Included in that group are Bailey Guard, the staff director. Bailey, it's nice to have you back in Alaska. Steve Shimberg of the majority staff. Martha Pope, minority staff. Linda Findlay of Senator Domenici's staff. Senator Domenici is from New Mexico.

With that we will get into the formal hearing. We have a number of witnesses here today, so we're going to ask that you limit your testimony to no longer than 10 minutes. With 23 witnesses, I'm sure you'll recognize that we'll be going through a good portion of the day.

The hearing record will remain open for 2 weeks so that additional written testimony that you might want to submit will be included into the record.

I'd like to welcome all of the people who have come today to testify, and view this hearing on section 404 of the Clean Water Act, or otherwise known as the Corps of Engineers' wetland permit program.

For those of you who might be wondering what 404 means; it is that particular section of the Clean Water Act, which covers activities that involve placing dredged material or fill material in certain waters of the United States. Now, you might keep that in mind because there's various addendums to that which will be referred to by some witnesses throughout the day.

I'm going to give you a little explanation of the history of the act which I think will be of interest to you. The Clean Water Act of 1977 is scheduled to be reauthorized by Congress this year. The Senate Committee on Environment and Public Works announced that Senator Chaffee, who is the chairman of this subcommittee, will begin hearings and the reauthorization process shortly after Congress reconvenes this month.

I'd like to state clearly for the record and for the public assembled here, the purpose of this hearing. We have not come here with an agenda for legislative initiatives to change the Clean Water Act. Nor is this nearing an advisory hearing or designed to take any particular State or Federal agency to task.

The purpose of the hearing is to build a record on how section 404 or wetlands permit program is working here in our State of Alaska.

This hearing is an informational hearing with a particular focus on reviewing the impact of section 404 in Alaska. The definition of wetlands and how it applies in Alaska, and to examine how the agency's responsible for implementation of section 404 interact and carry out their responsibilities.

As we begin our discussion today in the continuing Senate Environment and Public Works Committee interest in efforts of the State of Alaska and Federal agencies to implement section 404 of the program, I would like to quickly highlight the program's history and evolution. Probably the most often discussed aspect of the program is jurisdiction. The commerce clause of the U.S. Constitution is the basis for the authority of both the section 404 program and its progenitater, section 10.

I would like to refer to specifically, section 10. Section 10 of the Rivers and Harbors Act covers any work which might be an obstruction to navigation in the navigable waters of the United States, such as construction, excavation, and fill.

Now that you've had the definition of section 10, we'll refer to the jurisdiction. The question of jurisdiction has been tested in the courts for nearly 100 years. One of the first cases decided in 1981 was *Daniel Ball* v. *The United States*. And I think we finished as late as 1977 with *NRDC* v. *Calloway*. The courts, during this time, have firmly established the role of the Federal Government. The *Daniel Ball* case established the Federal jurisdiction over navigable waters setting the stage for passage by the Congress of the 1899 Rivers and Harbors Act, including section 10, which I've just noted to you.

In 1940, the Supreme Court in a case, *United States* v. *Applachian Energy*, ruled that navigable waters include those waters which were susceptible to navigation or could be made navigable by reasonable improvement. In 1970, *Zable* v. *Tabb* upheld the denial of section 10 permit because of potential damage to fish and wildlife.

In 1971, when the Congress began to write a comprehensive national policy for water pollution control, much had already happened. Congress started with the basis of previous action of the court and with the ecological premise that for pollution control purposes, that water systems were interrelated. Congress defined navigable waters as all the waters of the United States and established a comprehensive permit process to regulate the discharge of pollution into the Nation's waters in the Clean Water Act of 1922.

Initially, the draft legislation included the discharge of dredged or fill material. However, as the bill moved through the congressional process, dredge and fill activities were removed from the overall permit program. The NPD U.S. program then placed in a separate section 404 in order to continue regulation of harbor and channel dredging by the Corps of Engineers.

This new section 404, a mere three paragraphs long said that EPA would establish criteria for disposal sites for dredged material, and the corps would issue permits for the discharge of dredge and fill material. It included no definitions or reference to jurisdiction. However, the promulgated regulations which covered only traditional navigable waters.

A new round of litigation culminated in that decision and in the effect that navigable waters meant all the waters of the United States for the purpose of the section 404 program. The corps proceeded to implement that program. They phased in their regulatory program by starting with the traditional navigable waters for phase I and adding over time phase II, the primary tributaries and lakes, and phase 3, all other waters. Why they didn't start there, I don't know.

The Congress, hearing both complaints and strong support voiced about the program reviewed it extensively in 1976 and again in 1977. Congress rewrote the program, the Clean Water Act of 1977, to incorporate jurisdiction of all three phases and to provide for State delegation.

This is the program with an extensive legislative and judicial history that we are beginning to review here today. It has been a long and often controversial history. It has been 5 full years since Congress conducted a thorough examination with an eye toward possible legislative or regulatory changes. It has been 2 years since a specific hearing on the program has been held in Alaska. So, it is time to hear about the program as it is being implemented today, to hear from those of you in the very real world that have to work within this framework.

We are determined to conduct a thorough review and to consider proposed changes carefully, if any. Any change to improve the program should be considered, not just for the convenience of any particular person or for expediting the program, but rather in light of the goals and objectives of, and the experience gained in this important and controversial program and the sequence of events that have gone before us.

I have chosen to depart, perhaps with traditional structure of congressional hearings, in an effort to insure direct communication, and I hope for a lively exchange of ideas and concerns.

After Commissioner Ernie Mueller has testified, and after Colonel Saling has testified, I'm going to ask that they rejoin us again at the head table. I do this so that the constructive criticism and comments can be delivered directly to the two agencies most responsible for implementing the section 404 program.

In addition, if there are complaints, I would like to have their comments on the concerns expressed by the witnesses.

To set the tone of this hearing, let me try to put this program in perspective. The Corps of Engineers regulations define wetlands using the criteria of wetland vegetation, hydric soil and water. The definition implied by the Fish and Wildlife Service required only one of those three categories to qualify. The State of Alaska definition distinguishes between freshwater and saltwater lands. These differences in how the respective bureaucracies utilize the information has significant impact on how the definition of wetlands is applied to the Alaska situation.

The Office of Technology Assessment, using the Corps of Engineers documents, estimates that 223 million acres of Alaska fall under the definition of wetland. This is about 57 percent of the total landmass of our State. On the North Slope, over 75 percent of the area qualifies as wetlands. Interestingly enough 67 percent of southeastern Alaska is considered subject to the wetland program. Maybe that's because it rains so much.

The General Accounting Office released on June 17, a report entitled, "Developing of Alaska's Energy Resources: Actions Needed to Stimulate Research and Improve Wetland Permit Processing." The GAO will testify today that their report stated that of the 167 wetland permits and applications processed during fiscal year 1981, 127 were late. When compared to the Clean Water Act issuing goal of 105 days, the average permit time was 150 days.

We will hear testimony that the agencies have made great strides in reducing the time required to process the permit application. I believe that we will hear that many of the conflicts that have been typified in this program to a great extent, have hopefully been resolved. To a large part, we have to thank the departing District Engineer, Col. Lee Nunn, for those results. Colonel Nunn took a personal and an active interest in resolving the differences between various State and Federal agencies. His efforts and the cooperation of other agencies have been most monumental.

In conclusion, I am a strong supporter of the Clean Water Act. I appreciate the importance that wetlands play in the protection of the environment and the role it has in providing a habitat for wildlife and foodstocks for migratory waterfowl. I advocate strong protection for wetlands and water quality related to wetlands. I am interested in hearing from the witnesses on how the regulatory process is working here in Alaska today. I would like to know how the program process can be improved without adversely impacting the spirit of the law and the program. If no changes are needed, I would like to hear that as well.

I think we're ready to call our first witness. I would ask Col. Neil Saling and Commissioner Ernie Mueller to come to the witness table.

STATEMENT OF COL. NEIL SALING, DISTRICT ENGINEER, CORPS OF ENGINEERS

Colonel **Saling**. Good morning, sir. I'm Col. Neil Saling, the District Engineer of the Corps of Engineers for the Alaska district. I appreciate this opportunity to provide my comments on the section 404 permitting program to the committee.

The Federal Water Pollution Control Act Amendments of 1972 as amended by the Clean Water Act of 1977 were enacted to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. Section 404 of the Clean Water Act authorizes the Secretary of the Army, acting through the Chief of the U.S. Army Corps of Engineers, to issue permits for the discharge of dredged or fill material into the waters of the United States, applying guidelines which are developed by EPA in conjunction with the Secretary of the Army.

The corps has a substantial number of laws and Executive orders, some of which you've touched on already, with which we must comply. A brief list of these includes: the Clean Water Act, the Coastal Zone Management Act, the Fish and Wildlife Coordination Act, the Endangered Species Act, the National Historic Preservation Act, the National Environmental Policy Act, and Executive Orders 11990 and 11880 on wetlands and flood plain protection.

In order to accommodate these laws and regulations, we have developed a systematic approach for the issuance of permits. In its simplest of form, our system involves a public notice published 15 days after the receipt of a completed application, a public review of this public notice for a period of 30 days followed by a decision by the District Engineer on the issuance or denial of the permit. The heart of this decisionmaking process is what we call the public interest review. The public interest review stems from the provisions of the National Environmental Policy Act, NEPA, and it goes beyond, however, the traditional environmental factors and attempts to define first, whether the project purpose is in the public interest, and second, if it is in the public interest, how should it be constructed to maximize its worth to the public. The resultant balance process requires public input as well as technical input from State and Federal agencies with particular expertise. Input from the applicant may also be required concerning the significance of the impact the project will have on the environment. Additionally, decisionmaking is opened up to the public for comments and concerns.

Based upon the public interest review, the decision to issue, deny, or modify a permit is made by the District Engineer.

Based on this system, the corps nationwide, in 1981, averaged 128 days to issue a permit. Noncontroversial permits averaged 69 days, controversial permits—that is those in which there was some significant comment that had to be resolved—averaged 252 days for issuance, and permits requiring an environmental impact statement averaged 894 days for issuance.

I'd like to move now to the discussion of the 404 program in Alaska. I'd like to point out that the Alaska district has attempted to adapt our Corps of Engineers rules implementing the Clean Water Act to the particular Alaskan landscape. The size of the

State, the climate, and the unique vegetation has resulted in a program not typical of the remaining 49 States. Notwithstanding, we suffer from some of the same administrative problems which afflict our sister engineer districts, and which are amendable to some kind of reform.

The Alaska district has issued over 1,200 permits requiring section 404 authorization, more than one-half of these within the last 2 years. In Alaska, our average processing time has not met the congressionally mandated limit for time for processing permits. Our overall average has, however, gone from 186 days for all permits in 1980, to 123 days for the third quarter of this year. In all candor, I have to mention that during this same time, we have had permits that have run over a year to a year and a half to be issued. Some are 640 to 650 days. And I'm sure we'll be presented with some of the glaring examples of permit processing delays during the remainder of the testimony today.

The Alaska district supports a reasonable, balanced implementation of the regulatory program. The determination and delineation of wetlands for section 404 is the critical primarily step in implementing our 404 program. Our current regulations define wetlands primarily in terms of vegetation. However, because of the extreme climates found in Alaska, the vegetation here is tolerant to stress. And, as a result, a great deal of the vegetation found throughout Alaska is normally associated with wetlands elsewhere.

If we were to use only vegetation as a determining criteria for wetlands, then even greater amounts of the State other than the 57 percent you've cited, would be wetlands. The Alaska district has been using what we call the multiparameter approach in delineating wetlands. You touched on the three parameters in your opening comments, sir. This approach which the corps has been using over the last year, was developed by the corps waterways experiment station in Vicksberg. It consists of three parameters, vegetation, soils, and hydrology, to determine whether a particular piece of land is in fact a wetland. The evidence must be found on the site, of wetlands associated vegetation, of soils that are characteristic of wetlands, that is hydric soils, and of water in the root zone of the prevalent vegetation during the growing season before we determine that it is, in fact, a wetland. Using these three parameters, we are able to differentiate between those areas which are truly wetlands from those that might just exhibit the characteristics of a wetland on the surface. I might add that we wholeheartedly support the GAO recommendations, that we do need additional Arctic research, and particularly, further definition is needed of the roles of the various types of tundra as wetlands and their relationship to the waters which we are charged to protect.

We take an active part in preapplication meetings as a preamble to each permit. Preapplication meetings serve to help identify, for the applicant, potential issues which may exist for a proposed project. This allows the applicant to prepare a more complete application, which reduces delays in processing. Preapplication meetings to establish communication, and we actively encourage this communications exchange. The assigned permit processor routinely telephones the involved parties to quickly disseminate information on any given permit.

The Alaska district regards the public review period as an opportunity for serious comment and input on the proposed project. All comments we receive are given serious consideration, and each substantial issue raised during this process is addressed before a permit is issued. We try, in our permit processing, to expeditiously process comments within the 30-day comment period allowed after the issuance of public notice. But substantial comments received late in this period must obviously be addressed after the closing of public notice. Unfortunately, this is the rule rather than the exception. As I indicated previously, this period following the closing of the public notice, is an elastic period which, in the past, has covered the negotiation over permit stipulations. It is during this period the corps must establish those elements of the permit and of the proposed stipulations which are truly in the public interest. It has been this period of negotiation between the resource agencies and the applicant with the corps acting as an expediter to hammer out some compromise which has been one of the primary reasons for the extended time as far as permits are concerned. It is this process that has led to frustration on the part of the applicant, both in terms of the proposed stipulations, and in terms of the resultant delay in the issuance of the permit.

We talked a little bit about the basic type of permits that we have here in Alaska as a background for the rest of the discussion today. Basically, we have nationwide permits, which are established through publication in the Federal Register, general permits, and the regulatory individual permits, which are the most common type. In addition to that, for some projects, we have something called letter of permission for projects of minimal impact.

With the adoption of the current regulations, as I mentioned, in the Federal Register in July 1977, the corps issued a nationwide permit for work in certain waters for certain categories of work. This nationwide permit was intended to be used broadly to ease the regulatory burden on small projects not likely to have a substantial negative environmental impact, and on those projects not located in a sensitive environmental setting. The Alaska district has applied this nationwide permit in the broadest possible way. Every effort is made to categorize a fill placed in wetlands in such a way that is can be covered by this nationwide permit. Only after satisfactorily determining that the nationwide permit does not apply do we, in the Alaska district, require an individual permit.

In one case, specifically, here in Anchorage, we have exercised the discretionary jurisdiction in requiring individual permits in an area where nationwide permits might otherwise apply. This was only done after lengthy consideration and a request from the local government to exercise this jurisdiction. We do not require individual permits if the nationwide permit clearly applies.

The second type of permit is a general permit which is also authorized under our current regulations, and we are vigorously pursuing this type of permit. Starting in the third quarter of fiscal year 1981, the Alaska district began a concerted effort to identify and issue general permits. Thirty-two general permits have been proposed to date, ranging from work associated with the gas pipeline to work in residential units in Sitka, Anchorage, and the various HUD housing districts. We have issued 12 of these general permits and expect to issue another 10 before the end of this year.

General permits allow the Alaska district to more efficiently administer the section 404 permit program and at the same time, allow the applicant to proceed with construction with the minimum amount of delay associated with the individual permits.

By viewing the permit process as a positive, active, issue resolving process that provides the district engineer with the necessary information to make the decision on the permit, we attempt to avoid an adversary position, and instead, become an active moderator. We try to carry this into all the aspects of the regulatory program. As cochairman of the Alaska Wetlands Task Force, the Alaska district engineer seeks to bring needed attention to issues for which many agencies are responsible and in which various public groups are interested. As an adjunct, the district engineer holds monthly environmental "brown bag" briefings where the various environmental groups who are invited to discuss the issues and concerns that they might have in the area. This informal luncheon has fostered a two-way flow of communication and kept the number of surprises to a minimum. This was one of the initiatives which Colonel Nunn started and I intend to continue with it. The end result is a reduction in permit processing time and ultimately better projects.

While retaining the necessary Federal decisionmaking responsibilities, the Alaska district encourages and supports decisionmaking at the local level. We have participated in the development of various comprehensive plans, including most recently, the Anchorage Wetlands Management Plan. The general permits we have issued and those we are pursuing have returned to the local governments, much of the decisionmaking responsibility rightfully theirs.

That's somewhat of a preamble. Let me now talk a little bit about what's coming in the future. And the future is right now. The President's Task Force on Regulatory Relief recently issued its recommendations for improved implementation of the corps' regulatory program. While the primary goal of the corps' program, to effectively and efficiently carry out the congressional mandate to protect the Nation waters remains the same, several specific goals have been addressed by the task force.

Implementation of the task force recommendations will proceed—provided some of the needed reforms that I alluded to earlier are made, yet it will maintain the essential protection offered by the regulatory program. The issues addressed by the task force have also been matters of concern to the Alaska district. In fact, the Alaska district has received nationwide attention for some of its efforts to improve the regulatory process.

So at this time, let me briefly discuss the specific recommendations the task force made and try to relate them to our program here in Alaska.

The first recommendation is one of reducing uncertainty and delay in the permit program. The first recommendation—and I won't read each one in detail, I'll leave that to you—serves to strengthen the corps position on permit decisions. That is, the district engineer is the decisionmaker as far as permits are concerned.

This is a point we've attempted to keep clear, with the reviewing agencies throughout the time that we have been working in the permit program. The specifics of the implementation letter were received in a policy letter dated June 8, and this policy instructed specifically district engineers to reach a permit decision within 60 days of receipt of an acceptable application except in certain specific circumstances. Those circumstances included the need to hold a public hearing; those cases where environmental impact statements had to be prepared; the comment period was extended past 30 days—and that's a decision which the district engineer can make based upon firm justification; a timely rebuttal by the applicant to essential questions raised by the district commander which cannot be made during the 60-day period; a processing is stopped at the applicant's request; the application must be referred to higher authority and there is a lack of concurrence by the State on coastal zone consistency, which we must comply with; and other laws beyond the corps' control which precludes the district engineer reaching a decision, such as a lack of water quality certification from your people.

Coupled with the new time limitations imposed at the district level, the task force recommends a sharply reduced review process. Authority to request review is vested only in the top levels of EPA, Department of Interior, and NOAA. The Assistant Secretary of the Army for Civil Works, Mr. Gianelli will decide the level of the review, whether it be our engineer division, which is our next higher authority, OCE, or the Secretary of the Army. But in no case will the review plus the processing at the district exceed 120 days. The various memoranda of agreement are being hammered out now, and I have no indication of their total content. I just received this morning a notification that three of those have been signed and there are about three more to go with the resource agencies in Washington, D.C. I'm sure that the task force guidelines are being followed, the elevation above district level, and the threat of delay due to such elevation, I anticipate will be appreciably curtailed, if we follow the guidelines of the task force.

The second recommendation involves giving the States more authority and responsibility. The key to the second recommendation, as far as the corps is concerned, is the evaluation of existing State programs and a continuing respect for decisions made by State and local governments on such matters as zoning, land use, water quality, navigation, or other issues of national importance.

In addition, the Environmental Protection Agency will be asked to revise their portions of section 404 to provide increased incentives for simplified procedures for State assumption of jurisdiction of the section 404 program.

As far as the Alaska district is concerned, we've been working with the State of Alaska closely regarding the program and we're firm in our commitment not to override those decisions which the State makes, which are clearly their responsibility. As I've indicated earlier, we are vigorously pursuing identification of areas where general permits may be applicable.

The third general recommendation involves reducing conflicting and overlapping policies. Under this recommendation, the corps will revise its regulations to reduce the time needed for State action on certification requests to the greatest extent possible. It will also review those regulations which affect the Army's section 404 activities and which could impede implementation of the reform measures. I've mentioned earlier, the time limitations which are included in this review.

As you point out, sir, we operate under the rules which are written by EPA and the task group recommends that EPA rewrite those rules to simplify them and shorten them and make them more consistent with the reform measures which they are recommending.

The Alaska district supports this third set of recommendations. As you may know, we do issue joint State-Army public notices as one way to help reduce the delays. However, the steps to reduce State response time will be critical to shortening our processing time to the limits that I've specified.

The fourth recommendation involves the expansion of the use of the general permits, working in concert with the State. As I mentioned, we are already moving in the direction of these recommendations. We recognize the utility of these general permits, and we continue to be aggressive in this approach. We think it's an effective means of managing the regulatory program and it has many applications which we continue to explore.

The fifth and final recommendation of the task group was to clarify the scope of the permit program. This involves what you alluded to earlier on the jurisdictional scope. Hopefully, the program will be better defined to introduce a reasonable degree of certainty over the decisions regarding wetlands and identification of those that are essential to protecting the chemical, physical, and biological integrity of the Nation's waters, which we are chartered to do.

The Alaska district will continue to administer the regulatory program in a reasonable and accurate fashion as possible. This was the reason we went to the three-parameter approach as the basis for defining wetlands. In addition to that, it is our policy to ask two questions when we identify a wetland. First, does this area require a Department of Army permit. That is, do we have jurisdiction over this wetland. And second, which permit applies of the three or four that I have mentioned. We use technical wetlands only as a key to possible corps involvement, not as a justification for involvement.

That concludes my prepared comments today. In closing, I believe that the task force recommendations that I have just covered, will move us toward a shorter, but certainly more intense permitting process. Obviously, it is highly dependent upon timely inputs during the public review period. However, I believe the Alaska district can improve its performance by implementing the new guidelines that we have received. We have a good start based upon the initiatives of my predecessors, and I thank you for your time today.

Senator **Murkowski**. Thank you very much, Colonel. I would ask you to remain at the witness table. We'll call on Commissioner Mueller. I'll direct my questions to you both upon the conclusion of your statement, Commissioner. Proceed.

STATEMENT OF ERNST MUELLER, COMMISSIONER, ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Mr. **Mueller**. Thank you, Mr. Chairman.

For the record, I am Ernie Mueller, commissioner of environmental conservation for the State of Alaska. I'm here representing Gov. Jay Hammond, who asked me to express his regrets at not being able to be present at this important hearing. I want to especially convey Governor Hammond's appreciation to the committee for holding this field hearing here in Alaska, and to you, Senator Murkowski, and to your staff for the efforts you have made in preparing for this hearing.

As I'm sure you know, the issue before you today is one that is especially appropriate to Alaska. We contain, as we all have heard earlier today between 130 and 300 million acres of, quote, wetlands, unquote, including bogs, marshes, wet tundra, and shallow coastal waters. These areas support fish and wildlife important to the people of Alaska and to the Nation.

Alaska supports the concepts included in the present program of wetlands protection as conducted by the Corps of Engineers under section 404 of the Clean Water Act. However, we are vitally interested in its administration because of the many activities in the State affected by the program. Our goal is to prevent unnecessary costs in spent dollars and lost opportunities to residents and businesses affected by regulation, while still providing the protection necessary for wetlands ecosystems.

In July 1980, we testified to this committee that certain actions were necessary to improve administration of the program in Alaska. Subsequently, the State joined Federal agencies and other organizations to form the Alaska Wetlands Task Force to carry out these improvements. Over the last 2 years, significant improvements in program performance have occurred through the work of the task force's member agencies. The recommendations presented here are essentially an update of our July 1980 testimony.

Protection of wetlands is based on the recognition that these areas have important functions and values. We endorse the development of specific wetland management plans which identify these values and set forth management plans for them. Plans of this type have been completed and adopted as the basis of wetlands protection in the Sitka and Anchorage coastal management program which have been approved by the State and the U.S. Department of Commerce.

The Corps of Engineers has issued several general permits based on the Sitka plan and a general permit based on the Anchorage plan is due shortly.

The wetlands permit planning with a local coastal management program is occurring in other communities as well, including the North Slope Borough.

The State of Alaska recommends increased emphasis on the completion of those State initiated and locally initiated wetlands plans, as the basis for establishing boundaries of jurisdiction and important functions and values subject to regulation. Such plans can also be used to identify and develop the management strategies for areas of limited resource value where streamlined permitting through general permits and a few restrictions may be appropriate.

In July 1980, the State urged cooperation by Federal agencies to provide maps useful to the public for determining those areas subject to the 404 program. We are concerned that this program is not yet complete, and we must urge a greater effort. Perhaps this concept can be escalated as part of the current Office of Technology Assessment review of the 404 program.

Completion of wetlands maps in specific areas, such as the Kenai and Mat-Su Boroughs, could help identify those within the corps jurisdiction, provide for more rapid permitting, and eliminate or reduce application for after-the-fact permits by persons who are unaware that they are building in wetland areas.

Apparently, not all of the areas in the 404 program is eligible for delegation to the States. The Clean Water Act requires that the so-called phase I waters—those which are traditionally navigable, be retained in Federal jurisdiction. This split jurisdiction over the millions of acres in Alaska is already a problem. The State of Alaska cannot continue to support the creation of such an arbitrary set of boundaries unless there are public benefits which are currently unknown to us.

Improvements in the permitting process itself have also been made over the last 2 years. These include issuance of general permits for oil and gas operations, housing in rural areas, activities in communities with approved coastal management plans, assistance to applicants by my department's Alaska Permit Information Center, and the Crops of Engineer staff, completion of a manual for permit applicants that describes the permit process and acceptable methods of construction, and the incorporation of early field review recommendations in the design of large transportation projects.

The Clean Water Act requires State water quality certification of projects requiring a 404 permit. The Federal Coastal Zone Management Act requires 404 decisions be consistent with Alaska's approved State program, or an approved local government program. There is no reason why State approvals cannot, on the average, be approved within the period required for Federal permit review. The Alaska Office of Coastal Management has established a 45-day limit on the review of noncontroversial 404 projects. The Alaska Department of Environmental Conservation has delegated its decisions on 404 permits to its regional offices, eliminating the delays previously required by central office approval of permits.

The State agrees with many of the recommendations proposed by the President's Task Force on Regulatory Relief in the report entitled, "Administrative Reforms To The Regulatory Program Under Section 404 and Section 10 of the Rivers and Harbors Act," that Colonel Saling mentioned. These provisions emphasize the need to reduce delay in permit processing. The report emphasizes the next steps taken are the most important. Defining the administrative procedures, and adopting regulations to carry out this new program.

I want to emphasize that the implementation of Alaska's earlier recommendations not occur until the States have been formally consulted on the manner in which these changes are to be carried out. Such consultation is essential because of the numerous important responsibilities assigned to the States under the Clean Water Act.

In regard to regulatory changes, the States previously emphasized that the district engineer should have the authority and flexibility to deal with conditions unique to that district. I think Colonel Saling mentioned some of the steps the Corps of Engineers District in Alaska has taken to do exactly that, to utilize that flexibility.

Specific deadlines must be set for permit decisions, but may be extended for certain periods based on specific needs documented by the applicant or affected parties or by agencies with authority for project review. Unrealistic deadlines and automatic approval provisions may only encourage unnecessary denial or appeal of controversial permits.

There is no substitute for an active and aggressive effort to provide public information, preapplication consultation, and other forms of technical assistance to potential applicants.

The Department of Environmental Conservation is currently studying the feasibility of State assumption of the 404 program, including various options of delegations and improvements in the administration of the current Federal program. This study will emphasize key issues, including: one, State assumption of either a portion or the entire 404 program; two, methods of protecting identified national interests, and three, appropriate level and method of Federal oversight.

The State recommends revisions of the delegation process as is presently contained in statute and regulation to provide greater flexibility for the State administration of the program. When completed, we will provide a copy of the results of the study, and specific proposed language changes to the committee.

The State believes that the North Slope should be managed to protect important wetland values while allowing compatible oil and gas development. We recognize the cost accrued to the State as well as to industry from delay or stipulations which provide no additional resource protection. The key to this issue is proper planning. By completion of a wetlands plan for that area, important resource values can be identified. Habitat and resources have already been identified by the Alaska Department of Fish and Game. The Department of Environmental Conservation has identified stipulations commonly applied to types of development which are common on the North Slope. As yet, neither the North Slope Borough, nor the State or Federal agencies with management responsibilities in the area have been able to complete an area-wide plan. Completion for a wetland plan for this area, will reduce concern over what sometimes appears to be unplanned segmenting of the tundra by a continuing series of projects conducted by many different operators.

In conclusion, I want to emphasize our overall support for the 404 program and our commitment to reducing the public and private costs of program regulation, including a willingness to consider assumption of the program from the Federal agencies. Our recommendations are: to retain substantive provisions of section 404 as they are, except to provide more flexibility for program delegation to the States; to consult with States and hold field hearings prior to making any major changes in program administration; to establish reasonable but definite periods of time for permit reviews, while allowing specific extensions where properly justified; to maintain the current Federal jurisdiction over phase I, II, and III waters while emphasizing wetlands classification; to identify areas appropriate to different levels of resource protection; to increase Federal support for completion of wetlands plans; to require that any request for extension of a comment period be completely and fully documented; and to continue current and public notice of permit review by the State and Federal agencies to provide permit decisions within the same general timetable as the Federal permit process. And I'd be happy to answer any questions you might have.

Senator MURKOWSKI. Thank you, Commissioner. I would like to commend the testimony of both you gentlemen, particularly for emphasizing historically your experience with this very complex piece of legislation. I think your commitment and eagerness to expedite the processing within the parameters that are available to you under the law.

I might ask this question of both of you, and Colonel, if you would respond first, do you feel that the White House Task Force on Regulatory Reforms recommendations which you have summarized here will enable you to expedite this processing yet still provide the necessary protection needed? Do you see improvements that could be made, specifically, since the emphasis seems to be on simplification, yet maintaining the degree of protection that is necessary under the law?

Colonel SALING. The key, as I pointed out during my testimony, to the District Engineer in making a decision is the timeliness of the comments. We don't have within our total resources the capability to answer or even identify what all the questions are. So we rely on Federal, State, and private input.

Senator MURKOWSKI. Let me ask you this, within the areas that report to you—there's U.S. Fish and Wildlife, the Environmental Protection Agency, and yourself, as the three Federal agencies involved. I recognize you have the input from the State as well. In this process to expedite the recommendations of the regulatory task force in a timely manner, do you feel within the Federal agencies themselves, that you have the ability to coordinate their efforts in a timely manner, or are they—the EPA and Fish and Wildlife pretty independent as to their submission of material to you for comments?

Colonel SALING. Yes, they're very independent.

Senator MURKOWSKI. My next question is, are these agencies consistently late or are they responsive, could you comment on that?

Colonel SALING. They are not consistently late. They are responsive. They have a valid interest in protecting and telling me what their interests are from their particular area of expertise. Under the new guidelines, when that 60th day arrives, I'm going to have to be in a position to make some kind of a decision. I think in the next 6 months to 1 year, we're going to have to hammer out very precisely what information arrives when, so that I'm able to make that decision, because I'm committed to my superiors to make that decision come the 60th day, unless one of those other rules preclude me from doing that or permit me to extend it.

Senator **Murkowski**. So they have to respond to you within 60 days, or if they don't, they have to give valid reasons why?

Colonel **Saling**. That's correct, sir. If they have a valid reason, certainly, I have the authority to extend that period and I will.

Senator **Murkowski**. Do you feel the Federal agencies in Alaska have an adequate staff to process, in a timely manner, the permits that flow through the various agencies, EPA and Fish and Wildlife Service, in relationship to the number you said—I think—what would we have—2,000 or 1,200 that have come in so far?

Colonel **Saling**. Sir, I'd like to defer and let them tell you whether or not they feel that their resources are adequate.

Senator **Murkowski**. All right. Ernie, what do you think of these regulations as proposed by the President's Council on Regulatory Relief?

Mr. **Mueller**. We provided some information to that group during the course of their deliberations on the 404 program. Some of my staff met with the staff of the council. We think that they took into consideration the comments that we made. The principal concern that we had, and that we really can address, is the time frame in which the decisions are made. We don't have the authority to make decisions on jurisdiction, and what the relationship between the Corps of Engineers and the other Federal agencies are. But we see those relationships in that jurisdiction improving substantially because of the force behind the recommendations. I think, as Colonel Saling mentioned, those recommendations came out not very long ago. If you can get three Federal agencies to agree on memorandums of understanding and memorandums of agreement in 6 weeks on an issue as complicated and as important as this, that means that they have had direction from the highest level. And I think that's very constructive in terms of improvements in this program.

Senator **Murkowski**. The complimenting State agencies to you are Department of Fish and Game, and Division of Policy, Development, and Planning. Is your working relationship one that within these guidelines you would be prepared to operate under a specific time period? And if that was not reasonable in the sense that, say, the Department of Fish and Game asked for additional time, that you could either reject that or grant it, depending on what the circumstances were?

Mr. **Mueller**. There are two different decisions that are made, the one that's made presently by the Division of Policy Development and Planning, is to determine whether a project is subject to Coastal Zone Management and is consistent with the State's approved program. So many of the coastal programs are subject to that additional step.

Senator **Murkowski**. Fifty-seven percent of the State land mass theoretically qualifies as wetland within the Division of Policy and Planning. Is their job to approve these wetland plans? Is that correct?

Mr. **Mueller**. If they're in a coastal area. But if they're in the interior then the——

Senator **Murkowski**. Can you give us some idea of how much of the 57 percent of the State is covered by a wetland plan?

Mr. **Mueller**. Well, it's a very small portion. They're not encouraging that the entire State necessarily be subject to this sort of plan, but only those areas where the development is sufficiently high so that to the point that it becomes valuable in making decisions, and that means areas like Anchorage and the Kenai Peninsula and Sitka, Juneau, Haines, Ketchican, and the Mat-Su Borough, maybe the Bristol Bay area, and then the North Slope. Those are the principal areas where development is occurring on the wetlands. In other areas, it may be more efficient to make the decisions on a case-by-case basis.

Senator **Murkowski**. It's my understanding that the Clean Water Act has provided an opportunity for our State to administer the section 404 program since about 1977. Yet the State has taken a look at it, but has not taken it over prior to this year. Could you give us a little background on that? What is the greatest obstacle you see in State taking control?

Mr. **Mueller**. Probably two. One is the fact that the Corps of Engineers has a pretty efficient system for processing the permits. There's a certain amount of resources dedicated to do that that the State would have to duplicate. And there's no Federal money available for that implementation such as additional staff necessary to make decisions. That is the kind of bureaucratic problem that the State has to deal with itself. The other one, I think, is perhaps more fundamental. And that is that the so-called phase I, the traditional navigable waters, 404 permit decisions, cannot be delegated to the State, only the phase II and III decisions. The problem with that is the applicant will then be required to go to the Corps of Engineers for a permit on part of his property, and to the State for a permit on the other part of it. We think that that's confusing and maybe less efficient than the present program. So we're recommending, as I did before the committee in 1976, that the States be given the authority to take over the entire management of the 404 program but that the Corps of Engineers retain a veto power over that particular permit for those responsibilities that lie in their areas of jurisdiction such as navigation.

Senator **Murkowski**. Mr. Commissioner, do you have any timeframe for recommending when the State would take over the program?

Mr. **Mueller**. That depends on the outcome of this study that we have going on. I guess it should be done in several months.

Senator **Murkowski**. The study will indicate whether or not you're interested in taking it over or whether you're going to have to come up with a time schedule to take it over?

Mr. **Mueller**. Well, probably both, as well as the kinds of budget and resources that we would need, and any recommendations on changes to the act, and the present EPA regulations.

Senator **Murkowski**. I gather, perhaps from your reluctance, that you feel that at least for the time being you might be better off not to have it?

Mr. **Mueller**. Well, I think our position has to be, to some extent, that of the applicant. Where does the applicant get the better deal in terms of the processing of his application. I think without some substantial changes in the regulations, the applicant may be better off under the current program.

Senator MURKOWSKI. Could you comment on what changes specifically you would like to see, where, perhaps, the emphasis should be?

Mr. MUELLER. I think in generally two areas; one of them is a Federal oversight of State programs. I think the Federal oversight of this program would be conducted by the Environmental Protection Agency, of which we have substantial experience in the degree and type of oversight that they have. We're not always satisfied with that. We find that sometimes they're a little bit more nitpicky than we think that they need to be in order to satisfy the national need. We'd like to see some changes in that, and that loosened up.

Senator MURKOWSKI. Colonel, do you have any specific suggestions on ways to improve the program while continuing to protect the integrity of the law as far as your processing procedure is concerned?

Colonel SALING. I think as we get into the development of our particular permitting program under this new system, some of these may evolve. And as they do, I would like to transmit those to you. But at the present time, I don't have any that I can recommend as part of the formal hearing.

Senator MURKOWSKI. Thank you, Colonel, we would appreciate you and your staff submitting specifics so that these may be reviewed in total by the committee.

There was mention of unneeded permits. I assume that these are all associated with any activity or development in rural areas. What is the stipulation for an unneeded permit? I'm referring to the type of stipulations on the permit.

Colonel SALING. There has been criticism of the stipulations which we have included in the permit in terms of such things as the depth of a drilling pad, the height of a pipe which eminates from a source for petroleum, a number which had been recommended to us by the people who have the expertise in the environmental area. We have negotiated in some cases with the applicant to include these. It is a question not so much a fact, but rather of a decision on the part of the district engineer which of these should be included, depending upon your point of view, they are as you put it, unneeded. On the other hand, the people who have proposed these stipulations feel very strongly that they are needed. So it's a matter of opinion. But those are the kinds of things that the district engineer eventually has to sort out and make some kind of decision on.

Senator MURKOWSKI. You indicated in your testimony that you've met on occasion with representatives of various environmental groups to get their input on, I assume, the applications pending and the permit process. Do you also meet with representatives of development groups to get their input on the same situation, or do you depend on the application process rather than grouping them together?

Colonel SALING. Let me take two parts of that. Yes, we do meet with some of the groups which purport to represent the development side of the house by invitation. In terms of processing an individual permit, we rely primarily on the applicant to provide the kind of information that we need to make those kinds of decisions.

Senator MURKOWSKI. Well, I very much appreciate the extensiveness of your testimony. We'll look forward to the submission from both you gentlemen of your recommendations of specifics that might expedite the processing, yet provide the continued protection that is applicable under the law. And you've addressed, I think, in part, at least a concern that has been expressed by a number of Alaskans, and that is the processing time. And, of course, anytime we're involved in a new law or the application of a new law, it takes a while to set up procedures within the Federal and State agencies to gear up to the demand. I think your testimony bears out the commitment and willingness on behalf of both your respective agencies to hopefully expedite the process within the law that you must work under. With that I again want to thank you and invite you to join us at the head table and participate in the general testimony which will now begin.

Our next two witnesses that we will ask to come up is Mr. Eben Hopson, Jr., North Slope Borough, Barrow, Alaska. Mr. Hopson, we wish you a good morning. And we would like to call up Mr. Mike Meehan. Is Mike here?

UNIDENTIFIED VOICE. No, he's not.

Senator MURKOWSKI. How about Dan Krevenstein?

UNIDENTIFIED VOICE. How about Bruce Phelps?

Senator MURKOWSKI. All right. We've got Bruce Phelps on the list, too. We appreciate your participation. Mr. Hopson, I would ask that you proceed with your testimony.

STATEMENT OF EBEN HOPSON, JR., SPECIAL ASSISTANT TO THE NORTH SLOPE BOROUGH MAYOR

Mr. HOPSON. My name is Eben Hopson, Jr., special assistant to the North Slope Borough mayor. I appreciate this opportunity to present the views of native and other residents fo the North Slope Borough on the Federal Government's policies and programs for protection of wetlands.

The North Slope of Alaska is one of the areas most affected by the 404 program. There are existing and planned major oil and gas development activities proposed in an extensive wetland area. We believe the North Slope Borough's experience with this program is of particular relevance.

I would like to discuss the North Slope Borough's interest and the goals of the section 404 program, our experience with the Corps of Engineers and State procedures to date, and areas of greatest interest to the borough regarding any administrative or statutary changes in the program.

The North Slope Borough consists of over 80,000 square miles encompassing the entire northern coastal plain of the State of Alaska. Of that area anywhere from one-fourth to one-third of the North Slope may fall within the Corps of Engineers definition of wetlands and subject to the section 404 program. Much of the North Slope when not frozen is wet tundra with limited drainage due to the flat coastal plain and permafrost which lie just below the surface year around. Virtually all the current oil and gas development activity on the North Slope takes place in wetlands. Construction locations and methods include the use of gravel pads and roads must accommodate these unique conditions to avoid harming or destroying sensitive environmental areas.

The wet tundra and other wetlands along the streams and rivers support extensive waterfowl, wildlife, and fish populations of the North Slope. The North Slope is an extensive nesting, breeding, and summer habitat for hundreds of thousands of migratory birds from the lower 48 States. These wildlife populations are important to the continued subsistence lifestyle of the Native community. For example, plants growing in the wetland areas are utilized as a prime food source by caribou, a major subsistence species for our people. This, I want to emphasize, is why the wetland areas along the North Slope are a matter of local concern.

Senator MURKOWSKI. Mr. Hopson, in view of the number of witnesses, I wonder if I can interrupt you and ask that you move down on to, the specifics you have experienced with the section 404 program. We will include your entire testimony in the written record. If you could proceed that way, I would appreciate it in the interest of time.

Mr. HOPSON. Yes, the statement doesn't take very long. It doesn't take as much time as the other two did.

Senator MURKOWSKI. Well, the other two happen to be the major departments in charge.

Mr. HOPSON. Yes, I realize that.

Senator MURKOWSKI. We're just going to try and accomodate everybody. I will have to ask all the witness to try to be more concise. So please proceed. We're particularly interested in your experience with the section 404 program.

Mr. HOPSON. Other witnesses at this hearing with direct day-today experience with the section 404 program can provide specific examples of the problems and successes of the program. I would like to review our experience in more general terms and discuss the North Slope Borough's strong belief that an effective procedure mechanism is needed for proper review of new dredging or fill activities that could adversely affect critical wetland areas. Procedurally of proposed projects does not represent our position. In the majority of situations, permit approval was granted. When problems are identified, they generally can be mitigated through reasonable modifications to the project.

The North Slope Borough is not given a specific role by statutory language of section 404 in their review of permits for the development of Federal policies. As a principal local unit of government with substantial police and zoning powers, however, the Borough has been given an opportunity to present its views and recommendations to Federal agencies charged with the implementing of the program.

The North Slope Borough is generally satisfied with its legal consultation and involvement that currently takes place. It is our view, that the Corps of Engineers have made good faith effort to use the section 404 permit program as a mechanism for bringing together the various interested parties to review significant proposed development activities.

The section 404 permit review provides an excellent opportunity for all parties to discuss the scope of the project and its possible adverse affects on wetland areas. It provides an effective and useful vehicle for the Borough to present its concerns and has more than once served that purpose reasonably well.

Ideally, regulation of activities affecting the North Slope wetlands should be a function of the State and local government. There are many uncertainties regarding the ultimate environmental effects of development on wetlands. Therefore, the resources of all governmental units, including knowledge and experience of Federal agencies and departments should be available.

Until many of the remaining issues have been resolved, such as ultimate classification of the land of the North Slope, it is useful to have continued Federal review. The protection of the North Slope wetlands areas has national significance in a migratory nature of the waterfowl, marine, and terrestrial mammals that rely on those wetlands. This is the case in other wetland areas of Alaska that support commercial and sport fishing and other natural resources.

For these reasons we recommend at least in the foreseeable future the statutory authority for section 404 program be retained with any adjustment through modifications to the procedures and the interpretation by the administering agencies. We believe that problem can be eliminated with the current statutory program and do not support arbitrary elimination of procedural and protection support by section 404.

With respect to possible changes in the program, we offer the following general comments and suggestions: We need effective procedural mechanism to insure adequate review by all affected parties before development actually proceeds. A major attribute of section 404 program is its effectiveness in bringing together comments from the State, the North Slope Borough, and Federal agencies, so the applicant can address them in a systematic and coordinated manner.

Some procedures need not, however, be the same for all activities, given the differences within the North Slope. Some areas are more critical in terms of habitat or the values than other areas. With proper planning such areas can be designated or criteria established to insure they receive closer scrutiny. Procedure for areas of less sensitivity can be streamlined to expedite permit issuance. Rather than eliminate reviews for arbitrary definitions, any classifications, the procedural and substantive criteria can be tailored to reflect the nature of that area and type of activity being proposed.

Procedural mechanisms that insure protection without undue procedural burdens such as general permits should be utilized to mitigate some of the potential delays associated with the section 404 program.

Generally applicable control measures imposing no significant additional burden on applicants can provide adequate protection for sensitive areas.

There also continues to be a need for a comprehensive master plan for review of development on the North Slope. Such a plan would provide industry with a fast guidance on critical areas where special review would be required. Efforts to categorize the North Slope as wetlands or nonwetlands as well as identify the most critical areas remain uncompleted.

The North Slope Borough for several years has been developing a coastal protection plan pursuant to the Coastal Zone Management

Act. The borough hopes to complete a new draft in the near future which would provide a comprehensive management plan for development on the North Slope. This plan will not prevent or impede further development on the North Slope, but it will insure a reasonable review and regulation of the potential impacts of that development. The process for public involvement and State review, make it particularly useful and well-developed program that will be included—that should be included within the Federal administration of section 404.

I have attempted to make clear these comments of substantial protection of section 404. The ability should limit or prohibit the development that may destroy or harm critical wetland areas, are important and should not be eliminated. Such instances, however, constitute a small majority of proposed projects.

It is our agreement that the oil companies operating on the North Slope, as well as other industry, understand the need for and have made good faith efforts to protect the environment while carrying out their business activities. Continuation of section 404 program on the North Slope has not been consistent with development. The particular value of the section 404 program is that it brings governmental and private answers together to relieve these issues and reach agreement on the best method for proceeding.

It is a continuation of that mechanism that is of primary importance to the North Slope Borough. As a governmental agency and the most—and the people most directly affected by these activities, it is crucial that the North Slope Borough be consulted before development takes place, and that our concerns and policies be made part of the final decisions.

To the extent that this committee or their administration identifies problems with the program, we believe they should be handled administratively. Should any such changes be initiated, we request that the North Slope Borough be fully consulted and be considered an active participant in any revision of the section 404 procedures.

We are aware that the borough has more wetlands in the majority of this State, and we have to insure that they are accorded adequate protection. The problem is just with the procedures. Change them. Not the basic protections afforded by section 404.

We believe this program can be administered in a reasonable manner that achieves the ultimate goals of the statute without requiring overly stringent procedural requirements.

We appreciate the opportunity to submit these comments.

Senator MURKOWSKI. Than you, Mr. Hopson.

Mr. Bruce Phelps, would you introduce your associates, please?

Mr. PHELPS. Yes, I'm with the municipal planning department, municipality of Anchorage.

Senator MURKOWSKI. Thank you, please proceed Mr. Phelps.

STATEMENT OF BRUCE PHELPS, MUNICIPALITY OF ANCHORAGE

Mr. PHELPS. The municipality of Anchorage welcomes this opportunity to present testimony on wetlands regulation. We have submitted written testimony and I will try and summarize the first three pages and turn more substantively the recommendations in terms of changes to regulations themselves.

Senator Murkowski. I would appreciate if you would. Your entire statement will be included in the record, please proceed, Mr. Phelps.

Mr. Phelps. Thank you. Approximately 20 percent of the land area within the Anchorage Bowl is classified by the Army Corps of Engineers as wetlands. Presently, Anchorage has a very short land supply suitable for development. The impact of classifying a quarter of this area as potentially undevelopable land is a very serious situation. To resolve this problem, the municipality of Anchorage, as well as other communities in the State, have developed a wetlands management plan. Basically, this plan is intended to deal with the problems of wetlands development and wetlands preservation. We're trying to utilize a balanced use approach, that is, protect the critical wetlands area, and yet allow much private development to occur in those areas that are necessary for urbanization and economic development.

I'd just like to mention what the primary benefits of this plan have been to Anchorage, and also a model it provides for other areas of the State. First, it provides a balance approach and resolves a resource problem. Approximately 90 percent of all the private lands that are wetlands, have been identified in the wetlands plan for development. However, a large portion of those other wetland areas that are now owned by the government, either Federal, State, or local have been identified for protection.

Second, in terms of benefits, the plan is areawide in approach. Third, it provides predictability and local input into the section 404 permit process.

I would like to stress this point, without a plan, it is very difficult to reach consensus between the various resource agencies, the developing interests, and the municipality. With the plan, there is a consensus as to what should be done on a particular parcel of property.

When you're processing approximately 10 to 15 permits every 2 weeks, it—there is a need for such a document.

Fourth, the plan provides integration between the coastal management, water quality management, and comprehensive plans. As you are aware, there is a need, both by local as well as State and Federal law to integrate the review process. These plans provide the basis for this integration.

Finally, the wetlands plan leads to a general permit which will significantly reduce permit processing time and cost to both the private and public sectors. Draft general permits based on the plan have recently been issued by the Corps of Engineers. If they are issued in final form, just a few minor changes that we had suggested, the permits will do much to reduce the time, cost, and difficulty in obtaining wetland permits in less sensitive wetland areas of Anchorage.

Turning to the recommended change in the regulations. Because of our success in adapting to the section 404 regulations, we do not recommend at this time extensive changes, either to the basic law or to the regulations that translate the law into action.

The changes we believe are necessary in the wetland regulations would make a distinction between valuable and less valuable wetlands. We would recommend that some burden of proof be placed on the Federal and State review agencies to show significant value for wetlands in a State or a region before restrictions and permit requirements are imposed. The intent of these changes would be to balance these values with competing land uses. If a balancing procedure indicated low value, then a simplified shortened permit process could be triggered to reduce cost to developers and landowners, where high values indicate a strong Federal regulatory program, must be retained to prevent development in critical wetlands. We would not recommend at this time that the program be delegated to the States. Particularly, until we receive clarification as to what the State's role might be.

A streamlined but tough Federal program is necessary to protect the critical wetland areas.

We also support reductions in the time necessary to process wetland permits. Within certain markets and high interest rates for interim construction loans, builders often cannot anticipate their development plans. The delay of 90 to 120 days necessary to obtain a section 404 permit, combined with Alaskan short construction season, puts an unfair burden on the construction industry. We recommend a greater use of general permits for nonsensitive wetlands to speed up permit processing. We would like to emphasize the use of general permits wherever practicable and particularly where it's possible to merge a general permit to a wetlands management plan, such as now exists in Anchorage and Sitka.

There are two areas where additional Federal funds could help reduce the impact of section 404 programs on local government. The first of these is Federal funding for wetland studies that will clarify wetland locations and values. Again, before you know where they are and their uses, it's difficult to make management decisions, both for the regulatory agencies, as well as local government. In our plan, we have identified several wetland areas that need additional study. Federal funds to conduct these studies would be helpful.

The second need for assistance would be increased availability of Federal funds for the acquisition of critical wetland areas. There are now some programs to provide funds for this purpose, but they need to be expanded.

In summary, the municipality has recently completed a wetlands management plan in order to resolve conflicts between wetlands development and wetlands preservation, Anchorage. With the issuance of general permits based on the plan, most of the wetland permit problems for Anchorage will be resolved. Some changes to wetland regulations are needed. Regulatory activity and restrictions on development should focus on the valuable wetlands leaving landowners free to develop less critical wetland areas. Conversely, a strong Federal program is needed to prevent development of wetlands with critical resource value. Greater use of general permits is recommended to reduce permit processing time. I should add that the municipality is concerned with the length of time involved in processing and also the lack of burden of proof required by Federal agencies in their statutory comments on these permits. Again, the greater use of general permits is recommended to reduce permit processing time.

Wetland reviews by agency personnel should be more rapid and should be limited to wetland issues, not issues of land use or zoning or water quality management necessarily. They should be specific to the regulatory functions of the section 404 program.

This concludes our testimony. I would be glad to answer any questions committee members may have concerning the Anchorage program. Thank you.

Senator MURKOWSKI. Thank you, Mr. Phelps. I have a couple of questions for Mr. Hopson. In the process of your taking an application for a building permit with your borough, recognizing that the building, whether it be a home or anything else, what percentage of your borough has wetland plan? Or is it just those areas where there's presently some development?

Mr. HOPSON. I don't have those numbers with me. I have a staff person that can probably answer that question and can give you a written answer later if you would like.

Senator MURKOWSKI. If you would, I'd appreciate that.

Mr. HOPSON. We will do that.

Senator MURKOWSKI. May I ask you also if within the section 404 application of wetlands which has had some restriction on development, has this had a beneficial affect on the wildlife that's natural to the area? I guess my question is based on observation. Where the restrictions have been of some assistance in maintaining the natural wildlife within the areas, or have you seen a movement of wildlife away from traditional areas?

Mr. HOPSON. There has been movement that the section 404 permitting program causes.

Senator MURKOWSKI. Could you explain?

Mr. HOPSON. If the borough had some way of having input with the Corps of Engineers in giving the permit, we could say we know a certain area is a subsistence use area. That is our main concern.

Senator MURKOWSKI. Thank you very much, Mr. Hopson. Mr. Phelps, can you tell me how the processing procedure works within the municipality of Anchorage? If somebody comes to you for a building permit, do you examine to determine whether that's within a wetland area or how much of your 20 percent do you have already planned and zoned? Is there a problem within the municipality in processing the application?

Mr. PHELPS. There was a problem in the municipality in terms of moving the process along. But in terms of working with a plan, we tried to resolve that issue. Specifically, what would happen if a subdivision plat came through for approval, we would review that subdivision and see if it was inside the wetlands identification, and determine if there were critical wetland values. If there are certain design features we have to include we would record those as being plat conditions on the map itself. So we pick up new subdivisions as they come through for the wetland interest and wetland design measures. That is a separate process from our building permit. If a building permit is to be issued, and we determine it as in a wetland area, that is flagged, and we have a special review function that occurs there. So you have two separate processes—a building permit and a subdivision review process. Both to some degree are a link, particularly in terms of the building permit to be issued inside a subdivision approved area. Sometime they can be isolated between the two. In any event, we have two departments operating on these two permits, the public works and planning department. And each do catch wetland permit issues. The critical factor here is: One, a map showing where wetlands are; two, a plan saying what's important; and three, identification and responsibility by the department as to who is going to do what at what time.

Senator MURKOWSKI. And do you have all three?

Mr. PHELPS. We have those at this time.

Senator MURKOWSKI. And that map and that plan covers the entire 20-percent land mass of the whole area, is that right?

Mr. PHELPS. To be precise, we're doing the plan right now in a 1-to-200 map form, that covers not only the Anchorage Bowl, but also the Eagle River area and eventually the Turnagain Arm.

Senator MURKOWSKI. What is your processing time?

Mr. PHELPS. The processing time on a subdivision plat is approximately 30 to 60 days. That is mandated by law as far as subdivision plat process.

Senator MURKOWSKI. So it would not be up to the corps until after that time?

Mr. PHELPS. The section 404 permit is a different process. In that case, we receive the section 404 application, there is a central clearinghouse inside the municipality and an individual then sent out to the various departments, cultural, parks and recreation, transportation; then the permit testimony or comments come back to that central clearinghouse officer, and then the planning department in the municipality is charged with preparing a consolidated response. That in turn, is a consolidated response for sections 404 and 401 and ACP, coastal zone management. That will then go to the State as well as to the Federal Government, U.S. Corps of Engineers. So, you can see, we have a variety of tiers which we have to be concerned with, not just the section 404 process. All of which have to be integrated in time. We think now, we have the process in hand. But in the beginning, with a fairly large municipal department, it was somewhat complex and time consuming. And we did have time-consuming problems.

Senator MURKOWSKI. Have you a special line item budget for wetland processing or is it just done within public works and planning?

Mr. PHELPS. It's done inside, primarily from public works and planning as well as a number of other departments. We do not have a separate line item budget. It does represent a problem because quite a bit of time is taken up in the negotiations between the environmental agencies and the developer, in the same way the Corps of Engineers follows a mediation role, we also play a mediation role particularly between the developers and the other agencies. Much of the wetlands plan was trying to develop that consensus.

Senator MURKOWSKI. My last question is, You indicated in your testimony some reluctance to see the State take over the program, but I don't think you really said why. It kind of surprised me. Usually representatives on your level would rather work with the State because they're closer and can be more responsive than the Federal Government. Ernie is here and he's going to listen with great interest.

Mr. **Phelps**. One of the reasons is that the Federal review program, we feel, in the Anchorage district, has been administered fairly and justly and with great concern for the time impacts. And the program has gotten better. We are familiar with that program and the program seems to work. At this time, we do not know what the characteristics of the State program would be until they are described to us. Generally, as a matter of philosophy and principal, we want to have the State assume Federal programs. But we do not concur, necessarily in that approach until we know the specifics of the program. As the colonel was mentioning, we have the applicant, as our principal concern. We want that applicant to be served rapidly and fairly. The present system, with modifications that others and ourselves have suggested may improve that program considerably. In addition, if the State were to receive the responsibility for that program, we would hope that even further improvements would be made. If even further improvements would be made, we would support the State acquisition of that program.

Senator **Murkowski**. Well, Mr. Phelps, I assume that when Commissioner Mueller gets his study and recommendations done, you'll look at them with great interest. I thank you for your testimony. Mr. Hopson, I thank you. You're excused.

Mr. LeRoy Sowl, Fish and Wildlife Service from Anchorage. Mr. Sowl, we welcome you to the witness table. Mr. Ron Kreizenbeck, Environmental Protection Agency, Anchorage. Mr. Kreizenbeck, we welcome you to the table.

Mr. Sowl, please proceed.

STATEMENT OF LEROY SOWL, DEPUTY REGIONAL DIRECTOR, FISH AND WILDLIFE SERVICE

Mr. **Sowl**. It is my pleasure, Mr. Chairman, to appear here on behalf of U.S. Fish and Wildlife Service and the Regional Director, Keith Schreiner, to discuss our role in the operation of the 404 program here in Alaska. Colonel Saling has already covered some of the remarks I intended to make, so I will abbreviate this wherever that's possible.

Senator **Murkowski**. I would appreciate that in the interest of time, Mr. Sowl. I'm going to start limiting the witnesses to about 10 minutes now, so be prepared.

Mr. **Sowl**. The Clean Water Act, and specifically, the section 404 program is one of the most important of all of our Nation's current environmental laws. The law represents an important link in the chain of statutory requirements assuring protection for habitat that is critical to numerous fish and wildlife species of national significance. It is our belief that, if implemented appropriately, the section 404 program will allow well-planned and needed development to occur.

Resource conservation and compatible economic development are occurring within the present statutory framework. This administration is strongly committed to balanced development as provided for by Congress in the Clean Water Act, as well as the Fish and Wildlife Coordination Act and the National Environmental Policy Act. Central to sound management of the Nation's resources, is the equal regard for fish and wildlife resources through the consideration of alternative development plans, which include mitigation of project-imposed impacts. Proper regard for congressional intent and sound administrative practices should result in the successful implementation of the section 404 program.

The Fish and Wildlife Service has been actively involved in the review of the section 404 permit proposals since the inception of the program. In our review we have been following guidance established by the Department and the Service. As indicated previously, our mission is to preserve—is the conservation of fish and wildlife and their habitat while facilitating at the same time well-planned and timely development. In Alaska in particular, emphasis on coordination among all parties concerned in development is critical in achieving timely and thorough review of permits. As you know, in working with the corps, we must respond within 30 days of official notice. Given problems of weather and travel in Alaska, in many instances it is extremely difficult for our biologists to visit each site in that time. We are therefore, strong advocates of community and areawide planning efforts similar to those in Anchorage, Sitka, and the North Slope Borough.

It is our belief, based on past experience with wetland management, that projects that are coordinated with various local, State, and Federal authorities, prior to final engineering, do proceed without delay. Projects within communities where wetland plans have been formulated also proceed without delay. In those areas where no planning exists, proposals must be reviewed on a case-by-case basis, which, of course, is a more time-consuming process.

The Fish and Wildlife Service has been the forefront in the development of tools to facilitate sound resource management. The national wetlands inventory is an excellent example. In many instances, the area being mapped in this inventory coincide with wetlands under the purview of the 404 regulatory program. In some cases, however, wetlands are mapped which are not covered by corps jurisdiction. We are examining ways in which to make these maps more useful in the operation of the 404 program in Alaska, especially in those wetland types unique to our Nation.

Although the inventory is not complete, the formulation of cooperative wetland plans allows us to concentrate data collection in those priority areas that we expect development. When completed, these plans represent the consensus of the local, State, and Federal interests. Above all else, the plans provide the predictability both resource managers and developers need. These plans will serve as a basis for the expanded use of the general permit program. The Fish and Wildlife Service has been actively involved in these efforts. In addition, our research staff has just completed a study of the salmonid resources of the Kenai River. I might add that we had earlier mapped the wetlands there on private lands at a 1 to 25,000 scale. While these data could be used in the development of a wetlands plan for Kenai, to date this has not yet occurred.

There have been many suggestions for improving the implementation of section 404. This administration is addressing the need for change on several different levels through establishment of sound administrative practices. The Department of Interior has participated in the development of regulatory reform measures and is currently involved in implementation of several new administrative efficiences. Among the changes are the development of new section 404(q) agreements. And I might add that the Department of the Army, the Department of the Interior signed such an agreement on July 2. We also support expansion of the general permit program, especially as it relates to eliminating duplication at all levels of government; and clarification of the scope of the program and permit application process. We are examining whether there is a need for any legislative initiative in the context of ongoing regulatory reform.

I would be happy to answer any questions you might have, Mr. Chairman.

Senator **Murkowski**. Thank you very much, Mr. Sowl.

Mr. Kreizenbeck, please proceed.

STATEMENT OF RONALD A. KREIZENBECK, ALASKA OPERATIONS OFFICE DIRECTOR, ENVIRONMENTAL PROTECTION AGENCY

Mr. **Kreizenbeck**. Good morning, Senator. I'm Ron Kreizenbeck, Director of the Alaska Operations Office for the Environmental Protection Agency, Region 10. I'm pleased to be here today to talk with you about the 404 program and its operation in Alaska. Since the last specific hearings before this subcommittee in Alaska on section 404, approximately 2 years ago, some noteworthy changes have been taking place in the 404 program.

In the context of these changes, I would like to generally outline EPA's role in the dredge and fill discharge program under section 404 of the Clean Water Act.

Senator **Murkowski**. You can do that in 7 minutes, is that right?

Mr. **Kreizenbeck**. I certainly hope so, sir. I would like to dissect this and get to the meat of this.

Senator **Murkowski**. Fine. Go right ahead and dissect and we'll take the entire statement for the record.

Mr. **Kreizenbeck**. All right.

I will also address more specifically the issues of permits, State transfer and regulatory reforms especially with respect to the programs operation in Alaska. One of EPA's primary responsibilities in this program administered by the corps is to develop 404(b)(1) environmental guidelines in conjunction with the Army, and to review their proper application. While these are called guidelines, they have been promulgated as regulations, and are the basis for evaluating the physical, chemical, and biological effects the discharges and fill materials on the waters and wetlands of the United States. EPA reviews proposed actions to determine whether they are in compliance with the guidelines and where appropriate, proposes mitigating conditions or alternatives that would lessen adverse environmental impacts. Under section 404(c), the EPA Administrator has final authority to veto use of an aquatic site for disposal, if it would result in unacceptable impacts on municipal water supplies, shellfish beds, and fishery areas, wildlife or other recreational areas.

EPA is also responsible for transferring the 404 program to interested States and for helping to prepare States for that transfer. In addition to these responsibilities, EPA works with the Corps of Engineers and the Department of Justice to implement enforcement of the progam. EPA's Office of General Counsel and its regional counterparts represent EPA in 404 matters when legal action is taken against the Agency.

Over the last two years, EPA has been working to improve the effectiveness and the efficiency of the 404 program. This effort has been significantly expanded and the pace of reform accelerated by the May 7, 1982, issuance of the recommendations of the President's Task Force on Regulatory Relief in the section 10 and 404 programs. Over the last 2 years, most EPA regional offices have begun to participate in joint processing of permits on either a regular or periodic basis. Joint processing involves a meeting where the Federal agencies, and often State, and occasionally local agencies, come together to review permit applications and share information.

I'm going to skip down to the second paragraph on page 2.

Senator MURKOWSKI. That's fine. You can just proceed to summarize. You've used about 5 minutes.

Mr. KREIZENBECK. All right. Thank you.

EPA has given the State of Alaska a 404 program development grant to assess the feasibility of program transfer, and the work effort underway in the Alaska Department of Environmental Conservation. The study will focus on the technical, legal, and administrative and resource considerations for the State if the State were to take over the program. Final recommendations will address whether the environmental protection function of the 404 program and maximum administrative efficiency can better be achieved through the State assumption of the 404 program. The results of the study will lead to a primary role for Alaskans in the development and protection of resources within their State's borders.

Now, I'd like to skip to the final paragraph on page 3 which deals with the regulatory reforms, which I think are worth reading here today.

As I mentioned earlier, the 404 program was the subject of review by the President's task force. The administrative reforms developed by the task force are being implemented right now by the corps, EPA, and the Fish and Wildlife Service, and the National Marine Fisheries Service. There are five major areas of reform: reduce uncertainty and delay in the permit review process, which is 404(q); giving States more authority and responsibility; reducing conflicting and overlapping policies; expanding the use of general permits, and clarifying the scope of the permit program. I would like to focus briefly on EPA's particular role in implementing these reforms.

The 404(q) cooperative memorandum of agreement which was signed with the corps in 1980 provided for a maximum of five levels of review for controversial permits, where objections between EPA and the corps could not be resolved. While EPA has only invoked the elevation to the highest level 11 times, the multiple levels of review and long delays introduce a higher degree of uncertainty and pressure upon many permit applicants. We are now in the final stages of revising the agreement to provide only one higher level of review by the Assistant Secretary of the Army for Civil Works or his designated review official within a greatly shortened timeframe.

I'd like to skip down to the third paragraph on page 4. Finally, EPA will work closely with the corps to clarify the scope of jurisdiction of the 404 program to reduce uncertainty, whether a 404 permit is required. We will develop new and more specific criteria to redefine the scope of the program.

And finally, the last two paragraphs on page 5. The previous testimony deals with general permits and just reemphasizes our support of the general permits.

A number of general permits have been issued for construction of native villages, and others are being developed for minor activities in Anchorage. The Anchorage general permits are being developed in conjunction with the city following an extensive wetlands study and ordinance completed by the city with financial help from EPA's 208 program. We feel that the permits in Sitka and Anchorage are particularly important because they were developed out of the local planning efforts and reflect local needs for environmental protection and economic development.

In closing, I hope these remarks have been helpful in providing a useful overview of the interwoven roles of EPA and other Federal and State agencies in carrying out the current 404 program. EPA will continue to work closely with the State of Alaska in the present program. EPA looks forward to assisting the State of Alaska in its progress toward assuming the primary role in the dredge and fill program allowed by the current law.

Senator MURKOWSKI. Thank you. I do appreciate your efforts to summarize your statement. The entire statement will be included in the record.

I might ask if you're aware within region 10, which is your area of responsibility, if any other States have taken over the program to date?

Mr. KREIZENBECK. No, there are none.

Senator MURKOWSKI. Do you know why?

Mr. KREIZENBECK. Well, it's not the major program in Oregon and Washington that it is Alaska. There is interest in it. Both of those States are looking at it, but they're looking also at very substantial reduced state resources this year. And while they acknowledge that it would be a nice thing to do, they just dont't see any funds to do it.

Senator MURKOWSKI. Mr. Sowl, both the previous witnesses, Mr. Hopson and Mr. Phelps, indicated a concern over the lack of funding to coordinate and develop a wetlands planning process. How much flexibility do you have in your budgets to do some wetland planning on a continuing basis? I think it would be important to have that information.

Mr. SOWL. At the present time, the budget in our habitat preservation category area, which we're talking about here, does not have that much flexibility in Alaska. The money that we do have, we generally limit to what we would call emergency situations.

Senator MURKOWSKI. The Kenai was an emergency?

Mr. SOWL. Kenai at that time was a very controversial area. We put money into it. The plat bog controversy here in Anchorage——

Senator MURKOWSKI. Was it an emergency or did it become an emergency because it was controversial? We can arrange for a lot of controversial areas to become emergencies.

Mr. SOWL. It makes it very difficult to work when you've got people in your office throwing rocks at you every day.

Senator MURKOWSKI. I see. OK. That's how you create an emergency then. Mr. Kreizenbeck, along those same lines, how much assistance can EPA provide?

Mr. KREIZENBECK. Well, it's somewhat dependent upon Ernie and his part in it. The funds that have been used to date were section 208 funds. And that, as you know, is drying up. Those are being replaced by 205(j). It's a very small amount for the State of Alaska. That will go directly to the department of environmental conservation if they so desire to have it as part of their water program grant.

Senator MURKOWSKI. Is there funding in the act for the local communities to do wetland planning?

Mr. KREIZENBECK. Not that I'm aware of.

Senator MURKOWSKI. OK. So if there's no funding in the act, the likelihood of that source coming out now as a Federal appropriation is pretty remote? And so it will have to be done, apparently, unless remote? And so it will have to be done, apparently, unless there's Federal legislation introduced to authorize funding from the communities and State. Is that generally your consensus?

Mr. KREIZENBECK. That's correct.

Senator MURKOWSKI. It's been suggested that coastal management funds might be used for some of this. Do you have any suggestions? This may take some of the pressure off the local governmental bodies to come up with that funding?

Mr. KREIZENBECK. I'm not sure what the extent of those funds are. But I'm certain that there are some that are available for that.

Senator MURKOWSKI. You two gentlemen represent the lead agencies on the Federal side of the ledger to work with the corps in expediting and finally releasing the various permits. Do you have any specific suggestions with regard to the existing regulations or those proposed by the White House Task Force on Regulatory Relief that would expedite and simplify the process yet still retain the environmental concern, which is really what it's all about?

Mr. KREIZENBECK. Well, I think that we are very pleased with the way the program has been working in Alaska, and the work relationships that we have with the corps and the other agencies. We feel that we've done a fairly good job. I know some of the things that are being changed right now are things that would make the program more acceptable to the State. We heard mention of the State overview. We certainly support backing off a little bit on Federal overview of State programs. And we certainly support that. I don't have any other specifics at this time.

Senator MURKOWSKI. Do you have a staff that works on this?

Mr. KREIZENBECK. Yes, I do.

Senator MURKOWSKI. We would appreciate you submitting to us during the next 10 days any specific recommendations to improve either the existing legislation, or if you think it's fine, that statement would be appreciated as well. I would request the same information from Mr. Sowl, if you or your staff have any specific recommendations regarding the procedure, either existing or proposed under the regulatory relief recommendations.

Mr. SOWL. I'd like to make a comment right here, Senator.

Senator **Murkowski**. Sure.

Mr. **Sowl**. We're obviously going along with the regulatory reform. We've signed the agreement. I would say though, that for expedited permits, I don't think there's any subsitute for good local planning. I don't think regulatory reform can replace that.

Senator **Murkowski**. I would certainly concur with that Mr. Sowl. Tell me something about the processing time for the record as you understand it. The corps has to act within 60 days?

Colonel **Saling**. Under the new rules.

Senator **Murkowski**. Under the new rules? And you have to sign off—I'm speaking specifically to EPA and Fish and Wildlife, sirs. You have to sign off on that application within that 60-day period or do you have 30 days to look at it yourself, which really makes it 90 days time elapsed before the corps would sign off on it. Clarify the time frame.

Mr. **Sowl**. We have 30 days in which to respond.

Senator **Murkowski**. You respond to the corps, is that right?

Mr. **Sowl**. To respond to the Corps of Engineers. Sometimes we need additional time.

Senator **Murkowski**. OK. So it's 60 days all told?

Mr. **Sowl**. Sometimes we request additional time because we don't have the information.

Colonel **Saling**. That's basically in correspondence to the public notice period or public comment period.

Senator **Murkowski**. And I assume that this same situation is with EPA?

Mr. **Kreizenbeck**. Yes, we respond in the same time frame.

Senator **Murkowski**. Now that you're actually in the business of processing the applications and it's not something new, do you feel that you have the inhouse expertise to generally process most of them within that time frame?

Mr. **Kreizenbeck**. I can give you some statistics on that for the last quarter. In the period April 1 through June 25, we had three district offices here in Alaska. The Northern District processed 59 permits during that time, 5 of them were over the 30 days, that requested more time for information for processing of 92 percent within the 30 days. Our central Alaska office, which you have to realize, covers most of the development within the State. It takes in Yukon Delta and in the core part of Alaska. We had 59 permits. We processed all but 15 of them in that time for a 75-percent rate. And in southeastern Alaska, we had 63 permits. We processed all of them in that time. And our overall rate then, it was 181 permits, 20 of which exceeded the 30 days, for a processing rate of 89 percent.

Senator **Murkowski**. I assume that period from April to June is a lot better than it used to be?

Mr. **Kreizenbeck**. We did something similar to this 2 years ago when Senator Gravel held his hearing. We were running about 10 percent then. Now, wait a minute, I'm thinking—no, that's on denials. That's something different. Yes, we're improving our rate of response.

Senator **Murkowski**. How does EPA stand up to this recrod that's established by the Fish and Wildlife Service?

Mr. KREIZENBECK. Well, one of the critical things that I skipped over in my haste to meet the shortened time frame was our record. This is on page 5 of my statement. I believe we have improved the 404 operation in Alaska. In the year ending this May, EPA's Alaska operations office reviewed approximately 631 permits. Of these, EPA recommended approval of 519 permits, approval with condition of 90 permits, and disapproval of only 22. Out of the 22 that we objected to, our concerns were resolved for 6 projects.

Senator MURKOWSKI. Was that within the timeframe?

Mr. KREIZENBECK. Yes.

Senator MURKOWSKI. In 30 days you issued 519 permits?

Mr. KREIZENBECK. Yes.

Senator MURKOWSKI. Participants in the hearing should be encouraged to hear that substantial improvements and records are being set. You feel that you are able to process the current volume and still meet the criteria of the law which necessitates a very thorough examination?

Mr. KREIZENBECK. We are right now. But I would like to add one thing; if the Anchorage wetland ordinance had not passed, we were in a very critical mode. We would have had a volume of case-by-case determinations that we could not handle. I think that could happen in other places in Alaska as development accelerates there, too. But if we have the proper front end planning, I don't see any problem.

Senator MURKOWSKI. I thank you very much, Mr. Sowl and Mr. Kreizenbeck, for your testimony.

We will call next Mr. Larry Feltz, General Accounting Office, Anchorage, Alaska, and Senator Don Gillman. Senator Gillman, are you speaking for yourself, Senator, or the Kenai Borough or——

Senator GILLMAN. Senator Murkowski, I'm here today as a member of the Office of Technology Assessment Review Committee. And also wanted to share some of the experience and concerns that I have having been mayor of the Kenai Penninsula Borough.

Senator MURKOWSKI. Fine. Appreciate that very much, and would ask that you proceed, Senator.

STATEMENT OF HON. DON. GILLMAN, ALASKA STATE SENATE, OFFICE OF TECHNOLOGY ASSESSMENT REVIEW COMMITTEE

Senator GILLMAN. Thank you very much. Most of what I had intended to say has been said. So as not to be redundant, I'll be very, very brief.

Senator MURKOWSKI. I would appreciate that.

Senator GILLMAN. When I was mayor of the Kenai Penninsula Borough, there was a great deal of concern about the development of the Kenai River. About 1974, I believe, the planning commission asked the Corps of Engineers to do an assessment of the development along the Kenai River, to study erosion and the use of the river. When that document finally came out, it was the first Corps of Engineer-U.S. Fish and Wildlife-EPA document that was published in the State as a result of the court case. The public was unaware that this was going on. We, at the Borough, were not aware that this study had included all the tributaries and all of the wetlands within the Kenai River drainage that were both in private and public ownership.

I guess we were kind of the test case in the State on wetland review and issuing of permits. I think you will be getting some testimony this afternoon on what really took place.

I'm not convinced, Senator, that things are as rosy in Mudville as some people may have let you believe this morning. I've been out of the local level for a couple of years and there is someone here from the Borough that, I think, will testify. But let me just make a couple of comments. We have in the private sector, a lot of land that is now—and this isn't just true in the Kenai, this is statewide—private sector of the land is classified as wetland if you use one of the seven different types that are purported to be out there. We're getting to a basic problem, at least from my concept, that the local land use, zoning, is a local issue. Is a local responsibility. It appears that we may be in a situation where the use of permits actually is determining land management and has become one of the major land management tools, which is not being done at the local level except for the two or three instances that have been cited this morning.

Taxation then becomes another issue. We had many people that were denied permits along the Kenai River. They came to the Board of Equalization and said, OK, I can't do anything with my land. Are you going to tax me on it? At least in that case, our assembly took the position that they could defend in court if they had to, the idea that if there were permits that had been denied, they would put a zero assessment on that land as far as taxing. So we would get very close to this issue of taxing by permit. I think there are probably some pending suits on that. Whether they're from Alaska or other places in the United States.

We had discussed with U.S. Fish and Wildlife Service, Coastal Zone Management, EPA, National Marine Fisheries, Corps of Engineers, DEC, State Fish and Game and at municipal governments, how to go about trying to get general permits so that when a guy goes to the city council and wants to get a building permit that he's also going to get a permit to fill the driveways, plats, for fill and this City of Kenai has about 50 percent of its land mass that is wetlands.

We had a proposal that—evidently was restricted to Sitka, which is a very good plan. But it would have taken one and a half years, over $200,000 in about 40 square miles to come up with a wetland management plan for the city of Kenai, based on the requirements that the U.S. Fish and Wildlife Service, the National Marine Fisheries, and EPA had at that particular time.

Now, in the Borough, there's conservatively 67,000 square miles of wetland. We are talking about local governments coming up with a plan. I think there are two people that work in the Kenai Peninsula Borough planning department at this point that are, quote, any kind of professional planners. If that shifted to the local area, without a great deal of help, you're going to have another bureaucracy built at the local level.

During the time that I was mayor, I had worked closely with Senator Stevens' office. He asked if I would serve on the committee along with Dean Biseline from the University of Alaska. The two of us served in that capacity. As you know, there are ten areas within the United States that have been broken down for study, Alaska being one. There is a recent draft—and it is only a draft—it is not final. I think it summarizes the six major points that really are the key of the wetland issues in the State. And I'll read those and then conclude my testimony.

First, basic differences of opinion about the appropriate uses of wetlands, particularly those wetlands in private ownership. Two, lack of adequate information on which to base decisions. The last witnesses said, if we had the information, then we can meet that 30-day deadline. What happens if you don't have the information?

Contrast, scientific and regulatory definitions of what constitutes a wetland. Maybe the most important issue is what really is a wetland. Difficulties in determining the values of wetlands. The use of permits as a land management tool, and finally, procedural complications that have arisen in the process of administering the wetlands. I think that's kind of universal. That concludes my testimony. I would be glad to answer any questions.

Senator **Murkowski**. Thank you, Senator Gillman. I will hold questions until we've had the testimony from Mr. Feltz, supervisory evaluator, field operations division, Seattle region. Please proceed, Mr. Feltz.

STATEMENT OF LARRY FELTZ, GENERAL ACCOUNTING OFFICE

Mr. **Feltz**. Mr. Chairman, thank you for inviting GAO to discuss the wetlands permitting portion of our June 17, 1982 report to the Congress, entitled, "Developing Alaska's Energy Resources: Actions Needed To Stimulate Research and Improve Wetlands Permit Processing."

The U.S. Army Corps of Engineers defined wetlands to include extensive portions of the energy-rich North Slope. Consequently, Corps of Engineers permitting has become of prime importance in Alaska energy development.

Our review of oil and gas related wetland permits issued by the corps showed the process to be subject to delays, and to the imposition of costly permit stipulation without requiring documentation from proposing agencies.

We analyzed all oil and gas related wetlands permits issued in Alaska during the period February 1980 through September 1981. The total number of permits issued was 167. Comparing the time required to issue these permits with the Clean Water Act goal of 105 days, we found that 150 days was the average processing time for the 167 permits reviewed. Forty of the permits were issued on time, but the remaining 127 were late. Factors contributing to the delays were, first, virtually automatic extensions to agency comment periods, and second, the slow issuance of public notices.

The corps has routinely granted extensions of time for agency comments on wetlands permit applications. Corps regulations provide that extensions of up to 75 days can be granted if unusual circumstances warrant. Despite this, 51 percent of the 167 permits reviewed involved extensions to agency comment periods which the corps granted without requiring specific notification. Consequently, the 30-day comment period specified in corps regulations is frequently exceeded. Extended agency comment periods contributed significantly to delay in issuing oil and gas related wetlands permits. We found the average length of extensions to be 42 days.

Late public notices also contributed to permitting delays. After receiving a permit application, the corps is required to issue a public notice containing information about the location, nature and scope of the proposed wetlands activity and to provide copies of notice to interested parties. The corps' Alaska district has not, on the average, issued public notices within the 15-day period specified by law and regulation. For fiscal year 1981, the Alaska district averaged 21 days to issue public notices after applications had been received. And 50 of the 75 public notices were issued late.

In another report, issued in June 1980, we had recommended that corps districts periodically summarize the time required to issue public notices and enforce the 15 day timeframe established by law. Our latest work, completed in November 1981, showed that the corps' Alaska district has not met the 15-day goal and is not summarizing statistics showing the time required to issue public notices.

In addition to delays, we found that the corps is sometimes including costly and controversial stipulations in wetlands permits without requiring documentation to clearly justify their need. Overall, we found that 66 of the 111 permits which contain stipulations, had some documented support provided by proposing agencies. However, the remaining 45 lacked such support.

The corps does not require that agencies document the need for proposed stipulations with site-specific data and research findings. Some stipulations which have been included in wetlands permits without such support have been costly to comply with, and controversial from the standpoint of whether or not they are needed in particular cases. For example, some corps permits prohibited drilling certain months of the year, required impermeable waste disposal pits, and established a minimum pipeline height for animal crossings. Since the corps does not require that Federal and State agencies document the need for proposed stipulations, controversial and costly permit conditions are imposed with little scrutiny on the part of the permitting agency.

To improve the issuance of wetlands permits, GAO has recommended that the Secretary of the Army should: first, grant public comment extensions to the State of Alaska only when they are adequately justified; second, direct the Chief, Corps of Engineers, to have the corps' Alaska district management periodically summarize the time required to issue public notices and enforce the 15-day timeframe established by law; and third, require that Federal and State agencies support the need for proposed permit stipulations to the maximum extent possible with site specific data and relevant research findings.

Information on Army's progress in implementing our recommendations will be available in the near future. The Legislature Reorganization Act of 1970 requires the head of a Federal agency to submit a written statement on action taken on our recommendations to Congress not later than 60 days after the date of our report.

Mr. Chairman, this concludes my statement. I will welcome any questions you may have.

Senator MURKOWSKI. Thank you, Mr. Feltz. I think it most appropriate that your testimony was given. I think the fact that we have, in this case, a governmental agency involved in a check and balance, if you will, making some very constructive suggestions and highlighting the experience to date is most appropriate. I think it gives Senator Gillman some sense of satisfaction that perhaps efforts are being made to identify specifics as to where the problem areas are. I wonder, Colonel, if it would be appropriate if you have any comments particularly on the matter of written and adequate documentation and why the difficulty in the public notice publication. It would seem that those would be relatively simple.

Colonel SALING. First of all, as far as public notices are concerned, the time has been reduced through a variety of means. Word processing equipment for example. The public notice has to lay out in as much detail as possible what the particular project encompasses and associated with it are maps and so on provided by the applicant. We think we are meeting the 15-day limit now. We weren't at that time. We had a tremendous backlog.

One of the things I wanted to comment on earlier is that we talked about this 30-day limit and people getting their comments to us within 30 days. But because those comments include stipulations or mitigating procedures, we then go into a period of negotiation between the particular commentor and the applicant. That's where the time gets chewed up, not in the initial receipt of those comments. Once we get into that period, that's what I call the elastic period. That's where we may go for a considerable period of time. As far as the decision on a stipulation, the burden of proof is always laid with the applicant to show that the stipulation that was put in there was not necessary to preserve whatever environmental feature that it addressed. The burden of proof has not been placed on those governmental agencies which are supposed to have the expertise that put the stipulation in, in the first place. It is the District Engineer's ultimate responsibility, with the exception of two areas, Coastal zone consistency, and water quality, to finally come down and make the decision on which of the stipulations should go into the final permit. But I must emphasize that we must rely on the resource agencies who have the expertise and, you know, fish and wildlife, and all the bio that and land use and everything else. We hve to rely on those people for the stipulations.

Senator MURKOWSKI. Senator Gillman, in your experience with this program, do you feel that to proceed with some priority to have the State take it over would make it responsive to the concerns of the local community or as you've heard the testimony, they're doing an evaluation now on the pros and cons of taking it over?

Senator GILLMAN. I think most people would prefer to work with the State than they would Federal agencies. But there's a question that has to be asked. And that's the Federal oversight question. Does the State really take it over. That's the question that has to be answered. That would be a question that I would want to ask DEC. I would ask, are you really issuing that permit or are you just clearing it for someone else to buck it someplace?

Senator **Murkowski**. We certainly don't have a precedent set because no State has taken it over.

Senator **Gillman**. That's right. And that may be one of the points if there is any contemplated changes in statute.

Senator **Murkowski**. Let's ask the experts that we have here. I wonder if Colonel Saling would address that? Is it your understanding that if a State takes it over, the State is going to have the responsibility, or will it still be vested in an oversight of the Federal Government?

Colonel **Saling**. I hate to pass the buck, but the provisions in section 404 which deal with turning over the responsibilities to the State are something that EPA is much more conversant with than I. And I'd like to defer that if I could and have him address that question.

Senator **Murkowski**. Well, I think he's left. Is it not your understanding, Commissioner, that EPA would have probably an oversight?

Mr. **Mueller**. That's my understanding. Of course as part of this study, we're going to take a look at what that oversight would be and make some recommendations on it. I think from my perspective, we would want to make sure that was minimal, but the EPA might have other ideas.

Senator **Gillman**. Senator, if I could there's a second part to that answer. Another one is obviously, if the State takes it over, and the data has not been gathered, it then becomes a State responsibility. Frankly, the only show in town has been the Coastal Zone Management Act as far as funds are concerned for local governments, when we're talking about the local issues. Many of the local governments participated in Coastal Zone Management only because there were some funds available.

Senator **Murkowski**. Well, it's obvious, we've got another case where Alaska is different. It's certainly a priority. I don't think there's any other State that has anything like the significant land mass that we have that's included within the 57 percent. I think any other State would be modest in comparison. Yet, we are expected under this Federal dictate to respond in the planning process to get these plans approved and get the input and fund them on our own. But it's really a gigantic application and a major task. It's the only way, as has been stated in the testimony, and your application is probably as good as the plan that's going to respond to it. If those plans are not instituted and not established with some degree of expertise, they're going to do nothing but delay the application process, and as a consequence, the permits are going to be issued late.

The likelihood of the Congress appropriating some Federal funding to assist in this process is questionable in my own mind in view of the realities associated with misconceptions about Alaska. On the one hand there's a good deal of notoriety about our recent dividend program, but on the other, the significance of the application of the critical necessity of putting this into effect and the cost, is really staggering. I think that we're going to be very interested in seeing what Commissioner Mueller's recommendations are with regard to the take over of the program.

I have no further questions, gentlemen. I want to thank you for a very significant contribution.

I might advise you that very possibly there will be questions asked of you that we would like to submit back as a consequence of examination from the staff. So we would appreciate you assistance in that regard.

It is 20 minutes to 12. We're going to proceed with the next witnesses, Mr. Cliff Eames, National Wildlife Federation, and Mrs. Grayce Oakley, Alaska Realtors Association. I plan about a half-hour break for lunch. There is some question about going through the hearing, but I think everybody needs to stretch. And some of us won't have a chance to have lunch. But that won't hurt us. But I think a break is appropriate.

Is Mr. Eames here? OK. And Grayce Oakley. Shall we let Grayce go first? All right. Please proceed, Grayce Oakley, Alaska Realtors Association.

STATEMENT OF GRAYCE OAKLEY, PRESIDENT, ALASKA ASSOCIATION OF REALTORS

Ms. Oakley. Thank you. Regard for the importance of wetlands, particularly as they relate to natural water pollution and flood control is a viable concern. And we believe that it concurs with the intent of Congress in passing the Clean Water Act. However, that original intent needs to be periodically reviewed in order to remain the focal point of wetland management programs and regulations. From the perspective of private ownership of property, which incidentally, is only about one million of the approximately 200 million acres of wetlands in Alaska, the regulations that are promulgated by the Clean Water Act are a matter of concern.

Where these are known at the time title is acquired, it is incumbent upon the owner to plan his development and use of the property accordingly, but where the regulations have been imposed after title has been granted to a private owner, significant problems and misunderstandings can and do occur because the rights traditionally associated with property ownership are preempted by the regulatory agencies.

The first of these arises from a lack of a single definition for wetland identification. The confusion that has resulted thus far has reached the extent where otherwise prudent, knowledgeable property owners have title to wetlands without realizing that their holdings are so classified. Where Fish and Wildlife is using one definition for mapping, and the district corps is using another for regulating development of affected areas, the property owners can be at the mercy of either agency, or worse, be held in limbo while the agencies resolve the discrepancy. And I'd like to add here that I believe one of the later witnesses this afternoon has a specific case that deals with just exactly this matter.

Therefore, we the Alaska Association of Realtors would urge that all regulatory entities, Federal, State, and local, with jurisdiction over wetlands use have the same set of definitions. And we would further urge that these definitions have some geographic relevance. As an example, the definition that is most appropriate to a wetland area in the Mississippi River Delta is not necessarily equally applicable to arctic tundra on permafrost.

The second significant problem area is that of time and logistics in obtaining a permit for development in an identified wetland area. The proposed administrative reforms of the U.S. Corps of Engineers permit program released by the Presidential Task Force on Regulatory Relief do address the problem. Their outline for an average 60- and a maximum 120-day timeframe from receipt of completed application to the decision and issuance of a permit includes some appropriate reviews beyond the district corps level. And it is a tremendous improvement over the 3- to 27-month period that have been customary.

One note of concern in paragraph 1(a)(c) of that document. There's a reference made to a memoranda of agreement with the Departments of Agriculture and Transportation. These two Departments are not named in the proposed review process that I was—had available to me. It would be disheartening if the procedural time gains that are so carefully delineated are lost to some other agencies that aren't held to the same time frame for review.

We feel that the conditions outlined in paragraphs 2 and 3 are long overdue. And I'm very happy to see those. Making the general public aware of the significance of wetlands and the ecological need for their protection is also important. We feel that the public involvement in the development of the Anchorage wetlands management plan over the past 2 years has been significant in achieving this awareness. The concentrated effort by the municipality to identify and map the critical wetland areas has provided at least a degree of certainty that property owners could use for their own planning purposes.

When a community has exerted the initiative to involve its citizenry and to develop a local plan, it seems reasonable to urge that that plan be recognized and used as the primary guideline for assessing community needs. The parameters of the critical wetlands category can be most accurately determined at the local level where the comprehensive needs of the community and the available upland alternatives are readily ascertainable.

With those points emphasized, we specifically endorse 2 (a) and (b) with regard to the use of general permits and local land use decisions so long as they are exercised within the framework of the statute, which does acknowledge overriding state and national concerns.

Speaking for the realtors who also, we feel, speak for the private property owners, we acknowledge these proposed steps as a definite improvement. But they do have to be implemented to start to solve the management problems that have been created. And created because regulations have exceeded, we feel, the original intent of the act. But they also must be recognized for what they are, the first steps of many that are necessary. Thank you.

Senator MURKOWSKI. Thank you very much. Cliff, you are next.

STATEMENT OF CLIFF EAMES, COUNSEL, NATIONAL WILDLIFE FEDERATION

Mr. Eames. Thank you. Senator Murkowski, members of the staff, others of the panel, my name is Cliff Eames. I'm counsel for the National Wildlife Federation of the Alaska Natural Resource Center here in Anchorage. The National Wildlife Federation is the Nation's largest conservation education organization with over 4.1 million members and supporters, nearly 4,500 of them in Alaska.

I'd like to thank you very much for the opportunity to speak to you today about section 404 and its importance in Alaska. We believe that section 404 is vitally important to protect the physical, biological, and chemical integrity of the waters of Alaska, especially the wetlands that support our abundant fish and wildlife resources.

This morning I'll briefly answer three questions, first, why regulate activities in waters in wetlands, especially in Alaska; second, how does the section 404 program work; third, what are the results of regulation through section 404 in Alaska. I'll delete the majority of that first section, why regulate waters in wetlands in which we discuss the values of wetlands. I do that reluctantly, because I think that we all too frequently overlook wetland values as we focus on ways to make the section 404 program more efficient.

Let me just mention a couple of statistics, however. The Nation has lost more than 40 percent of the wetlands that once covered the lower 48 States. I think we should try to avoid repeating that mistake here. Secondly, regarding the use that Alaskans make of wetlands, in 1975, resident Alaskans spent nearly 13 million man-days enjoying wildlife related recreation activities. Sportsmen alone spent almost $145 million in hunting and fishing related expenditures. Alaskans, moreover, benefited from urban as well as rural wetlands, Potter Marsh being the most obvious example, in Anchorage.

How does the section 404 program work? Contrary to frequent assertions, section 404 does not prohibit the filing and use of wetlands and thus stop development. Operation of the program bears this out. Only six section 404 permits were denied by the Alaska District out of 274 permits processed in 1981. This trend is indicative of the program nationwide, where less than 2 percent of all corps permits, section 10 and section 404 are denied each year. In most cases, section 404 permit application and review allows development projects to move forward, and frequently conditions are imposed that minimize the effects on water quality and fish and wildlife habitat. Nationwide, applicants apply to the corps for approval of projects that would destroy about 600,000 acres of wetlands annually. Through modifications and conditions to permits, half of this wetland destruction is prevented.

There are specific issues concerning the implementation of the program that should be addressed. The jurisdiction of the program, the time required to process permit applications, and the role of the State and section 404. The issue of jurisdiction is before Congress again this session. S. 777 cosponsored by Senator Bentsen would restrict section 404 to waters which are used or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or farm commerce shoreward to their ordinary high water mark. This change would substantially restructure the implementation of section 404 in Alaska, excluding many important Alaskan wetland resources from federal oversight under the 404 program. Of the 221 section 404 permits issued in Alaska in fiscal year 1981, almost half were for activities in nonnavigable waters. These activities would not be covered under S. 777. Nationwide, only 17 percent of the permits processed by the corps are for activities in nonnavigable waters. Yet 85 percent of the Nation's 148 million acres of wetlands fall under this nonnavigable classification. Reducing the jurisdiction of section 404 will not significantly reduce the permit load, but will have a significant impact on the wise and balanced use of the Nation's wetlands.

There has been a certain amount of uncertainty concerning which waters are covered by section 404. In Alaska, some people question whether tundra or wetlands that are perched above permafrost should be included as part of the Corps' program jurisdiction. However, these wetlands are no different than wetlands in other parts of the country that are perched above impermeable bedrock or clay. These tundra wetlands are just as valuable to ducks, geese, swans, moose, bear, and other wildlife as are prairie, potholes, or bogs, or other types of perched wetlands.

The Corps of Engineers in cooperation with other Federal agencies is now in the final stages of developing the multiple parameter approach that Colonel Saling discussed. This is an important first step in clarifying for the regulators and the public, waters under the jurisdiction of section 404 and should be given a chance to work. This approach to defining wetlands seems more reasonable than that of S. 777 which avoids the problem by eliminating jurisdiction.

Permit processing time. Probably the most frequent criticism of the section 404 program is that it takes too long to get a permit. We support the most efficient processing of permit applications under section 404 and the elimination of unnecessary regulatory requirements consistent with the protection of the Nation's waters.

In Alaska, it takes an average of between 90 and 100 days to process a noncontroversial application. The average is closer to 200 days for those projects that are considered controversial. The average for all permits is about 170 days, a little more than the national average, but there are some very good reasons why it should take longer on the average to process permits in Alaska. Several of these reasons have already been mentioned. Let me add, however, that Alaska lacks the resources base line data that is frequently available elsewhere so that necessary studies are more apt to hold up decisions. Additional funding for wetland inventories and other baseline research would help solve this latter problem.

Finally, although I note some disagreement at the hearing already, my suspicion would be that most people in fact would agree that additional funding and manpower for all of the reviewing agencies' regulatory components could not help but bring permitting times down.

There are measures that can be taken by district engineers that would minimize permit processing delays, and many of these have already been incorporated to some extent into the program operation in Alaska. The first example is general permits. To date the corps nationwide has issued 361 regional and 13 nationwide general permits. And it estimates that they have eliminated the need for approximately 60,000 individual permits each year. The Alaska District has issued 12 general permits.

Second, careful planning, reapplication consultation with the corps and other agencies and the submission of a complete application by the applicant will result in significant reductions and delay. Applicant assistance, packets being updated by the corps and recently produced by DEC, will help alert developers to ways they can speed the permit review process. According to the corps, the one factor causing the greatest amount of delay is applicant inaction. Both the reviewing agencies and the applicants have a responsibility to act in a timely fashion.

Third, Federal and State agencies can coordinate more effectively to speed permit review. In Alaska, we have a one-stop shopping for the applicant, combining the section 404 permits, the 401 Water Quality Certifications, and CZM consistency determinations.

We support the State regulation of nonnavigable waters under section 404 subject to an objective set of performance criteria. We believe the takeover criteria could be more flexible, and are willing to work with the corps and EPA to develop a program more attractive to the States. Since these nonnavigable waters are national resources, however, the Federal Government should assure that the State programs meet all the requirements of the Clean Water Act. Sufficient State program criteria must remain to conserve these resources and to provide for rapid Federal oversight.

What are the results of section 404 in Alaska? I am happy to be able to finish on a very positive note. One of the major problems facing Alaska when hearings were held on section 404, 2 years ago, was the lack of knowledge among many members of the public concerning both wetland values and the mechanics of the section 404 program. Although we haven't yet completed the task of fully informing Alaskans, we have made significant strides. Both the corps and the Fish and Wildlife Service have produced and distributed informative brochures about wetlands and the section 404 program. An EPA and the Fish and Wildlife Service film on wetlands that contain some excellent Alaskan footage has been shown throughout the State. The corps has taken a very attractive color photo display to many Alaskan cities. Finally, it's been noted earlier, two applicant assistance booklets are either in the process of being updated or have been produced.

The desire to bring about increased involvement of local governments and their citizens in wetlands management plans is the recurring theme at the previous Alaska hearings. As other people noted, we have plans for Sitka and Anchorage, five general permits have been issued as a result of Sitka's plan, and several general permits are in the mill as a result of the Anchorage plan.

Another thing that we've gained over the past 2 years is a track record, one that we can be proud of. I have listed a couple of examples here that I won't read today, of permit review processes that have resulted both in additional protection for the resources and in financial savings for the applicant. There are many other examples of efficient and effective processing under section 404 that I can share with you. Alaska's program has matured into a balanced program of cooperation between Federal, State, and local governments. Real progress is being made toward solving the administrative problems that do exist. Based on our experience in Alaska, we urge this subcommittee to support this section 404 program and to refrain from making any changes that would reduce the minimum level of resource protection that the program now provides. Thank you.

Senator MURKOWSKI. Thank you very much, Mr. Eames. I must apologize, Ms. Oakley, for having to leave the room for a few moments, but I have read your testimony and want to bring out your concern that perhaps the Federal agencies involved along with the State and local agencies, have, in your mind and probably in the minds of many other members of the private sector a concern over the definition of wetlands. Perhaps we can ask Colonel Saling, or Commissioner Mueller if they feel that this is an area that needs to be addressed. Do we have a redundancy here or do you feel quite certain that you know what the definition is and it means the same to everybody? Ernie, you look like you're ready to say something.

Mr. MUELLER. That was brought out by Senator Gillman. I think there is some public confusion as to what a wetland is that is subject to regulation and where that regulation appends. The Corps of Engineers has done a lot in the last couple years, both to provide on-site inspections to determine whether that piece of land was subject to wetlands regulation or not.

The other thing that the corps has done, is to help train people in other agencies to help make those same determinations on behalf of the applicant. So, that is to be commended.

Senator MURKOWSKI. Do you use the same definition as the corps, or does the corps establish the wetlands and you acknowledge that it is wetlands?

Mr. MUELLER. I think it's probably the latter case more than anything else.

Senator MURKOWSKI. All right.

Mr. MUELLER. We need to have one agency that makes that decision. We can't have people running around second guessing each other.

Senator MURKOWSKI. Do you have the same definition of wetlands as the EPA and Fish and Wildlife?

Colonel SALING. The definition that's in our rules is not necessarily word for word the same as the other agencies.

Senator MURKOWSKI. Would you suggest this might be a tangible improvement in any changes that might be made in this to at least use the same definition between your three agencies?

Colonel SALING. The definition as written, can be argued over the words in it. But when somebody from my shop goes out in the field to make a determination as far as whether something is a wetland, and then make a jurisdiction definition, we have very little problem, particularly with the State, in terms of whether or not that is or is not a wetland and whether it is or is not something we have to exercise jurisdiction on.

Senator **Murkowski**. Could you offer Ms. Oakley a little suggested relief on how, from the standpoint of the group that she represents—might have——

Colonel **Saling**. When I go through my file on any given morning I find a whole stack of determinations of wetlands for many of her people. In the end, that's what you come down to, if there is a question that a large scale or a small scale or a map or some other general document can't determine, in the end, one of my people has to go out on the ground and attempt to make that determination. That's what it comes down to.

Senator **Murkowski**. You don't use the rule of thumb, that if there's any question, it's probably a wetland?

Colonel **Saling**. If you stand on it and it's up over your ankles, it's probably a wetland.

Senator **Murkowski**. Supposing it's frozen?

Colonel **Saling**. You wait till the summer.

Senator **Murkowski**. You feel better, Grayce?

Colonel **Saling**. There is a very definite problem of determination of what is a wetland, particularly in the wintertime. Many of the things that we look at, in terms of water—of course, when it's in a solid state, is very difficult. The whole area of tundra is a major problem.

Senator **Murkowski**. I would ask the indulgence of the professional staff, to take back with you the significance of just what 50 percent of an area one-fifth the size of the United States means as far as implementing this particular law and it's tremendous burden. I hope you'll help me explain it to some of our colleagues. I guess we're down to the crux of it now.

Ms. **Oakley**. May I just add that I think what Anchorage has done with mapping and what they've done up front in their plan has gone a long way to identify the areas so that property owners have some idea, particularly if they're in the process of acquiring the property. If they know going in that that's what they're going to be dealing with, then they can plan accordingly. That's an entirely different set of circumstances than having a piece of property and then having some regulations imposed on you later on in the game. I made that point earlier. I think the more that can be mapped and identified and the sooner it can be done, then we're all working from the same criteria. Eliminating that confusion will go a long way toward helping with the definition problem.

Senator **Murkowski**. Right. I think the testimony given by Mr. Bruce Feltz indicates what the municipality of Anchorage is doing to address it.

Ms. **Oakley**. Yes.

Senator **Murkowski**. I'd like to commend Cliff Eames on his testimony, particularly for bringing to life some of the positive aspects associated with the history to date from an environmental view on the fact that we can be proud of what we've done even though it's been a slow process and perhaps a bit cumbersome. I think, as an observation, the fact that we are now dealing with it, being able to learn how to deal with it, can soften some of the fears associated with the processing time. I'd like to again compliment you for the very positive aspects of your statement with regard to the good job that we've done.

Mr. **Eames**. Thank you.

Senator **Murkowski**. I think it's noon now. We will adjourn the hearing until 12:45. I would also like to thank those of you who have been with us this morning that perhaps can't be with us this afternoon. Again, I would ask those testifying this afternoon to keep their testimony to a 7-minute timeframe. I'm afraid we're going to have a pretty tight time schedule. The hearing is adjourned until 12:45.

AFTER RECESS

Senator **Murkowski**. I'd like to call the hearing back to order on the wetland permit program for Alaska, section 404 of the Clean Water Act.

Mr. Homer Burrell is our next witness. Mr. Burrell represents the Alaska Miners Association. I will also call up at this time Ron Lautaret.

Ron is with the Sierra Club, Anchorage, Alaska. I welcome both Mr. Burrell and Mr. Lautaret to the committee, and ask that you proceed with your testimony. Again, I'm going to ask that you keep your testimony to 7 minutes.

Mr. **Burrell**. Do you have any preferences?

Senator **Murkowski**. I have no preferences. Gentlemen.

Mr. **Burrell**. I'll go ahead.

STATEMENT OF HOMER BURRELL, ALASKA MINERS ASSOCIATION

Mr. **Burrell**. I'm Homer Burrell speaking for the Alaska Miners Association. Most of the miners are either out in the hills or should be, so they called me and I thank you all for letting us speak.

So far, the Alaska Miners Association has had very little contact with the section 404 program because there's been no significant mining operations commenced in Alaska since the 404 program has been in effect. There are several in the mill and they will no doubt be involved in it, so we can't speak to that yet. It's something that's coming.

There are about nine problems areas that we think are significant. And I shall touch on them very briefly in a summary form. Individual permits are required without regard for potential adverse impact. Full permit processing is required even when they agree on mitigation measures well in advance. General permits are not properly utilized, which does not seem to be in accord with Congress intent of simplification. The Corps of Engineers' jurisdiction over the tundra is unnecessarily broad. It doesn't seem to recognize biological realities. The program unnecessarily duplicates those required by existing State laws, and there's a lack of guidance by Congress for developing stipulations. Reviewing agencies—and this is a legal problem—are not required to provide written justification of their permit stipulations, which makes them susceptible, in my opinion, to judicial attack.

Multiple layers of review and a lack of deadlines results in a considerable delay. And the provisions for State assumption of the program are far too burdensome and very few States have therefore assumed the burden.

We recommend about six legislative changes. For those wetlands that remain under Federal control, we would recommend a change in the legislation to require the Secretary to develop a classification of wetlands that can be used to determine whether it really is a wetland and what type of permit is necessary, and what mitigation stipulations are required.

The act should be amended to require the Secretary to utilize those earlier mentioned classifications just mentioned—classification criteria to set forth those wetlands which can be adequately protected under general permits, and thus may be routinely considered.

Corps and outside agency review should be amended to insure that all permit stipulations address the water related environmental concerns that are accompanied by a statement of rationale.

The State primacy provisions should be amended to simplify the requirement for State control and limit the Federal role to oversight in the States that asume their primacy position. For example, the Federal veto permit after delegation, that does not seem necessary or advisable.

The States should have more authority over its wetland resources by limiting the Federal jurisdiction to those waters that are currently navigable or susceptible to navigability by reasonable improvement, together with the adjacent waterlands.

And since the corps has a lot of statutory jurisdiction, they should also have the statutory jurisdiction not to exercise that jurisdiction, so we can utilize its resources where—for the best purpose.

Finally, we feel there should be more emphasis on the general permits. And if you ever get past the general permit stage, get those outlined in broad terms so people can function under those and there will be little necessity or at least a minimal necessity for the individual permits. And in that case, people can proceed much faster and solve the deadline problems.

The objectives in the definitions of 404 should be defined. We need a definition of wetlands so badly. And there are so many definitions floating around now, it's pathetic. We have conflicting definitions, opinions. It would be most useful if the legislature would define wetlands after reasonable input from everybody concerned, so we all know what we're talking about. And we can proceed from there. And you people wouldn't get trapped with some of the subsequent testimony here today, people getting trapped by after-the-fact definitions of wetlands. And I don't think that anybody wants to do that. And I think I'm within my 7 minutes.

Senator MURKOWSKI. Thank you very much, Mr. Burrell. I appreciate you outlining your recommendations for changes within the 404 program relative to our entire country, as well as the State of Alaska.

Please go ahead Mr. Lautaret.

STATEMENT OF RON LAUTARET, ALASKA CHAPTER, SIERRA CLUB

Mr. LAUTARET. I too shall be well within the 7 minutes. My name is Ron Lautaret. I'm a Sierra club volunteer and member of the

Alaska Chapter Conservation Committee. I would like to take this opportunity to thank Senator Murkowski and members of the Environmental Pollution Subcommittee for holding this hearing today.

The Alaska Chapter, Sierra Club supports section 404 of the Clean Water Act as presently written. We believe the program has worked successfully in Alaska by allowing development to proceed while protecting valuable wetland habitat. We urge reauthorization of the Clean Water Act without any change to section 404.

Much discussion has taken place over the Corps' definition of wetlands. We support the present definition. If the surface feature is wet, with plants rooted in saturated soil, regardless of whether or not it overlays an impremeable surface such as permafrost, it is a wetland. Congress intended to regulate such wetlands under section 404. We are not aware of any scientific evidence contrary to the corps' definition of wetlands. The Sierra Club believes that the greater public education and understanding of the value and use of wetlands will serve to diffuse the misunderstandings that presently exist. This hearing is an excellent opportunity for that.

Another important misconception which needs to be dispelled is that section 404 prevents building or discharge of wetlands. The Corps of Engineers records show that the overwhelming majority of permits, 98½ percent requested in Alaska in 1981 were granted. If this trend continues, most of Alaska wetlands available for development will be used for construction rather than preservation.

The decisionmaking process under section 404 particularly in Alaska has worked very well. Under the leadership of Colonel Lee Nunn, the resource agencies and public groups have all had an opportunity to be involved in a consensus decisionmaking process. The public participation provisions of section 404 provide an invaluable forum for concerned agencies and public entities to express their views of any permit. No similar mechanism exists under many Federal and State decisionmaking processes.

Recently the municipality of Anchorage completed its area-wide wetlands plan. The plan effectively demonstrates the value of regionalwide wetland planning. As a result of this plan, wetlands with high values for maintaining water quality, wildlife habitat, and urban open space will be protected. At the same time, certain lower value wetlands will receive general permits for dredge and fill. Incidentally, virtually all of the public—or private wetlands in Anchorage were placed in the category which permits development. With the regional wetland planning process in place, sound scientific research and data can be used to make decisions on general permits.

The Alaska Wetlands Task Force is an important interagency group which came into existence after hearings on Section 404 a few years ago. Their main purpose is to educate the public and provide information on wetlands, to define and mat wetlands, regional wetland planning, surveillance and enforcement.

While the task force has done good work in shortening the timeframe for processing permits, little else has been forthcoming. For example, the surveillance and enforcement task force has only met twice in the past year. We hope that the subcommittee will urge the task force to take a more active role in working on wetlands issues.

Finally, the Sierra Club is very concerned with the lack of surveillance and enforcement by the Corps of Engineers and other resource agencies after permits are issued. For a variety of reasons, probably due mainly to a lack of adequate staff, once a permit is issued, it is a rare occasion when any agency does a followup field examination. Additionally, even when violations are discovered, there is rarely a fine assessed or other reprimand given.

Further, the Corps of Engineers takes a very long time to act on illegal construction activities that have taken place in wetland areas without a permit. Again, very few fines are levied or requests made to remove the fill. And usually, a permit is issued to the violator. This situation almost acts as an incentive to avoid complying with section 404. If a person can get a permit after the fact, why bother applying and face the permitting process before beginning work. The Sierra Club strongly urges greater funding and staff be allocated to follow up work and enforcement of section 404 permits after they are issued.

In conclusion, section 404 has been a constructive and workable permitting program. For the reasons stated, we support its continuance. This concludes my testimony. Thank you.

Senator **Murkowski**. Very good, Mr. Lautaret. Might I ask each of you to comment again on a concern that was expressed by Mr. Burrell. In your statement, Mr. Lautaret, you indicated that you felt the present definition, namely if the surface feature is wet with plants rooted in saturated soil, regardless of whether or not it overlays in a permeable surface such as permafrost, is a wetland. And in your statement, Mr. Burrell, you indicated the necessity of, I assume, a more precise definition. Colonel Saling earlier generalized that ultimately it was probably his department that had to go out and make the final determination of whether it's a wetland or it isn't. That being the case I assume, Mr. Burrell, you feel a little uncomfortable with that general situation that you don't know until the Corps comes out and visit you, and you'd like to see something more definitive so that the average layman could make a pretty good assessment as to whether he was faced with some type of activity associated with a wetland or not?

Mr. **Burrell**. Yes, Mr. Chairman, that's correct.

Senator **Murkowski**. Do you have any suggestions on how we might approach that? I'm sure the Colonel would also welcome less footwork on behalf of his people going out and making that determination?

Mr. **Burrell**. Well, there's several problems addressed there, Mr. Chairman. First is, when is a determination made? If anybody wanted to be real safe, they could write the Colonel a letter and say, I'm thinking about doing something on such and such piece of land, would you please tell me whether or not it's a wetland. Well, that part harasses the Colonel and his limited staff to the point where they probably wouldn't even get home at night if they even tried to comply with those requests. There ought to be some general criteria, some kind of a definition so one can look at it and say, well, I either have a problem or I don't have a problem, or I might have a problem. If it's the might category, then they have to call on them for help. If they're in a I have a problem category, then they know they have to get a permit. There ought to be somebody who knows whether or not they're a wetland, besides down on the Sierra Desert. There ought to be someone who knows they're not in a wetland. There ought to be some criteria that can be looked at objectively. I think that that can be defined. I do disagree with the Sierra Club's definition that if it is rooted in apparently any soil, regardless of what's underneath. We all know how thin the soil can be in alaska. You can have rock underneath it.

Senator MURKOWSKI. I think you used the terminology saturated.

Mr. BURRELL. Saturated. Well, all of the soil is saturated here after a good rainstorm or after breakup. But if it's 2 inches below that, there's rock. I just don't think that's a wetland. I'd like to see some biological evidence. Some scientific evidence rather than a bunch of lawyers writing it.

Senator MURKOWSKI. Colonel Saling has offered to read into the record the definition which, I assume, is what you use, for all practicable purposes, as the court of last resort here in Alaska, is that correct?

Colonel SALING. Right. I'm going back to the Federal Register of July 19, 1977, which lays out the regulatory program for the Corps of Engineers. And let me read it. But before I do, let me point out that there is no handy-dandy layman's definition that you can go down to Joe Six-Pack on the street and hand it to him and say, go out and identify wetlands. My somewhat factious comment earlier about getting your ankles wet is about what we're talking about. This definition I'm going to read lies somewhere closer to the other end of the spectrum. But this is the definition:

> Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands will generally include swamps, marshes, bogs, and similar areas.

That's the definition that has been settled on. To support that, as I pointed out, we have this three-pronged approach, which looks not only at the vegetation, but the kinds of soils that are normally associated with saturated soil conditions, and also with the hydrology, that is the type of moisture that appears at the root levels of the vegetation which is on the ground. So I understand that definition does not help the guy on the street. But on the other hand, that's what we use as the basis for determination when we go out and do a field analysis.

Mr. BURRELL. Mr. Chairman, if I might comment very briefly. The definition is undoubtedly a wonderful one. But how do you apply it? As a practical matter, Joe Six-Pack has nowhere to go with that piece of paper. He probably can't even read it, let alone understand it. I'm not trying to be facetious now, but that's too difficult to apply for an ordinary person, at least, to apply on the ground. I see some scientists having a great deal of difficulty applying that right now on the ground.

Senator MURKOWSKI. Well, I'm sure that there are others in the hearing room that would like to comment on this as to its adequacy or inadequacy. I think that the definition given out of the Federal Register by Colonel Saling was one that's understandable on the basis of its general interpretation. But we all are aware that it goes much further than that. And that seems to be where we get into trouble.

I wonder if, on this matter, Commissioner Mueller might have a comment or an observation as far as the point that's been brought out in the testimony and the response over the definition?

What problems do you have?

Mr. MUELLER. Well, the problem at one point in time was did you use Fish and Wildlife's definition or did you use the Corps of Engineers' definition as to what a wetland was. And that was a pretty difficult thing to deal with. But now, using the definition the Corps has, which, by the way, I recall has been adopted by the State in its coastal management program as the State's definition for those purposes as well. It does have a certain amount of quality to it that needs an interpretation by someone who has been trained in that particular area. So that doesn't as you say, help the average man on the street. But we've encouraged the Corps to provide training to people in how to identify these areas, and they're doing that. They have done that with people at other agencies besides the Corps of Engineers' staff. The publications that we put out and the Corps of Engineers' displays help describe what the typical wetland in Alaska is. So it's at least helpful to the people who are proposing development projects, but it's not really definitive.

Mr. LAUTARET. May I say also that if regional plans are developed, they will identify wetlands so that there isn't a question. Our position is that if it's functionally a wetland, it doesn't matter whether it's over permafrost or granite or whatever. If it quacks like a duck, it's a duck.

Senator MURKOWSKI. Even then, I assume that if a wetland plan is developed, you have to acknowledge that it is a wetland?

Colonel SALING. We have to participate in the development of it.

Senator MURKOWSKI. Well, I can sympathize with inability of the law to make it clear as to just what the definition is and carrying it out from the standpoint of a layman's knowledge and understanding and the workability of it. I certainly see no reason why the Government agencies should vary in their definition. Certainly, Fish and Wildlife, EPA, and the Corps should, I think, agree on what the definition is, so that it's very tight. Then it would allow the planning agencies to more or less repond in unison rather than trying to work with 1½ or 2 definitions. I assume that that would be agreeable. I would take up that charge within the committee to see if we can't use that definition. Do you have any objection to that procedure?

Mr. BURRELL. No, sir. No, but I——

Senator MURKOWSKI. You want to go further, I understand.

Mr. BURRELL. Mr. Chairman, one point to Mr. Lautaret. If you've got 2 inches of saturated soil with grass growing on it on top of granite, and you're not in the drainage, you're not within one-half mile or 100 feet or whatever is appropriate. It's not affecting navigable waters or waters of the United States, I just say don't tell me that that is wetlands.

Senator MURKOWSKI. Well, I'd guess we would have to refer to the Colonel. Would the Colonel come in and say it was?

Mr. BURRELL. I don't know.

Colonel SALING. It depends on the situation.

Senator MURKOWSKI. I think we're compiling a record here and that's the point of this hearing.

Colonel SALING. Let me just make it clear, that eventually, we have to relate back to what some of the basic purposes of the Clean Water Act were. And that's really a fourth determinant factor when you start talking about a wetland area. Where you can go in and make the other determinations, but eventually, you have to determine whether that piece of wetland actually does contribute either in the direct way or the indirect ways that have been applied by judicial decisions as far as the Clean Water Act is concerned. So it really does depend on the situation when you come in. But when you get down to the point as to whether or not this little piece of ground is a wetland and should be treated as such, or this little piece is an upland, then you've got to go down on the site and make a final determination. I can't give you a rule of thumb. I don't think my people can either, other than go down, look at the site, and say, "Yes or No." That's it.

Senator MURKOWSKI. In my opening remarks, I made reference to the fact that Congress defined "navigable waters" as all of the waters of the United States, and established the comprehensive permit program. That's the dilemma that you're faced with. I can understand and appreciate that. That's the obligation that the colonel is faced with, making that determination. The unfortunate part is that again, the position of the State of Alaska with regard to the other States, is that it's much more of a priority concern. I have no further questions, Mr. Lautaret, thank you for your testimony. And thank you, Mr. Burrell, I wish you a good afternoon.

Our next pair is Mr. David Cline of the National Audubon Society and Mr. Don Glass of the Alaska Oil & Gas Association, this represents our 12th and 13th witness respectively.

I welcome your testimony, and would ask that you proceed in your own order.

Mr. GLASS. I defer to Mr. Cline. I would't want him to be 13th. And I'm accustomed to that.

Senator MURKOWSKI. Well, whatever is fair. Mr. Cline, I guess you're 12th.

STATEMENT OF DAVID R. CLINE, REGIONAL VICE PRESIDENT, NATIONAL AUDUBON SOCIETY

Mr. CLINE. Thank you very much, Senator Murkowski, and members of the committee staff for holding this public hearing on wetlands. I am representing the National Audubon Society here today. Particularly, it's more than 2,000 members here in Alaska. It is one of the country's largest and oldest conservation organizations. We've maintained a longstanding committment to both the protection and wise use of our Nation's wetlands. This includes those being managed in our system of 75 sanctuaries around the country.

I would also like to commend you, Senator Murkowski, for demonstrating such issue—interest and issues such as the Clean Air Act and Endangered Species Act. As well as clean water, I think your positions to date have been both ecologically and economically sound and I hope politically sound as well.

In the last few years we feel that there has been considerable progress made in successfully implementing section 404 here in Alaska. I'd really like to emphasize—I think one of the principal reasons for this is the commitment and dedication that I've seen among career professionals in both the Federal and State resource agencies. I think we feel especially indebted to Colonel Nunn, our recently retired Alaska District Engineer for the Corps of Engineers. In our opinion, Colonel Nunn did a superior job of administering the section 404 program in Alaska. And we're very confident that Col. Neil Saling will do equally as well and look forward to working with him in the future.

After many years of experience in wetlands as a duck hunter, a wildlife viewer, and career conservationist, I'm convinced that our Nation's wetland protection effort is in serious trouble. As well pointed out recently by the Wildlife Management institute, unless some significant changes in laws, policies, and attitudes are made, there is no future for a large portion of wildlife that depends on wetlands. This includes the fabulous migratory bird resource, ducks, geese, and swans that migrate from Alaska to the lower 48 and even other countries on an annual basis. So if many of these populations disappear because of loss of wintering and migration habitat, it will affect hunting, trapping, subsistence use, wildlife viewing, and a variety of other recreational and educational opportunities here in Alaska.

As was pointed out this morning, the best estimates indicate that our Nation has already lost more than 40 percent of its original wetland acreage. Not to be overlooked is the fact that this tragic loss of wetlands has occurred under what we might refer to as privatization, that is the private ownership of public assets.

I will just very briefly highlight some of our principal concerns for the program in Alaska regarding section 404. Although we basically support the intent of general permits, we are concerned that these not be implemented carelessly in our State. We would support comprehensive permits only after an interdisciplinary team of resource specialists has done the necessary research to determine wetland values, and a comprehensive plan has been developed to support such general permits. In no cases should they be issued simply to expedite development in wetlands or flow of paperwork in a Federal bureaucracy.

Highlight recommendation for improving the section 404 program. I would really like to have us look nationally and at Alaska at more incentives to wetland owners to conserve these valuable public resources. Either to protection under their ownership or looking at options such as donation of the wetlands themselves, or associated development rights to State of Federal wildlife agencies or private organizations.

We would urge your committee to take a close look at legislation such as that recently introduced by Robert J. Lagomarsino, H.R. 6465, which we understand it is designed to provide tax relief to those who are willing to sell wetlands to Government agencies or tax-exempt organizations.

One of the major issues we see with strengthening section 404 or making it fair for everybody, is also take a very close look at agency budgets. It's our feeling that there's been quite a bit of unfair criticism of the Corps of Engineers and other agencies with requirements to process applications for wetland permits. We feel there's a need for substantial staff increase in the corps office here in Anchorage enabling the corps to establish satellite offices both in Juneau and Fairbanks. The purpose of this would be to better serve permit applicants and to provide more vigorous monitoring and enforcement of permit stipulations.

Given an approved budget situation, we then urge the corps get more involved with the applicants in terms of preapplication informational meetings so that these people know exactly what is expected of them once they submit their application for a permit.

We would also urge the corps to step into mediation when a review agency, be it EPA or Fish and Wildlife Service, gets into a stalemate with an applicant. We feel the corps has a major responsibility there. Also, as I mentioned earlier, to be more vigorous in permit monitoring and enforcement, because whether we like it or not, there are illegal dredge and fill activities going on around our State even now.

We also feel there's an applicant responsibility. And we would hope that as all wetland owners get better informed as to the values of these wetlands, both to themselves, and to the public, that they will be much more positive and helpful in providing information that's necessary to make wise decisions determining—wise decisions regarding permit review.

So, in conclusion, I would say, we believe the Clean Water Act section 404 permit program has been working reasonably well in Alaska and deserves our strongest support. Because of the increasing demands on Alaska's vast, certainly, yet limited wetland resource from such activities as on the gas development, agriculture, mining, urban sprawl, and now a proposed extraction of extensive coal and peat deposits, that the program needs to be strengthened, not weakened. And I feel that a national goal for protection of wetlands, including those in Alaska continue to follow the policy well articulated in Executive Order 11990 dated May 27, 1977, in which it stated that development of wetlands should not proceed unless there is no practical alternative to such construction, and second, that the proposed action include all practicable measures to minimize harm to wetlands which may result from such use. So, we strongly support the section 404 permit program and feel that it should be continued to be administered judiciously by the Corps of Engineers. Every effort must be made, however, to overcome serious staff and budgetary deficiencies currently hindering the corps program. In fact, hindering that of the other review agencies. For example, this morning, I felt that GAO testimony was a bit unfair in identifying problems relating to the time in which permits are processed. And I think the question has to be asked just how many people do these review agencies have to do this in a judicious manner. For an example, I understand that EPA has only one person, if my information is correct, to carry out permit review responsibilities for that agency. So, what is at stake, is, of course, one of our greatest national assets, that is Alaska's wetlands. And requiring that a permit be obtained, I think, is a small price to pay for the long-term protection of these valuable resources. Thank you for your consideration.

Senator **Murkowski**. Thank you very much. I appreciate your testimony, Mr. Cline. Next is Mr. Don Glass, Alaska Oil & Gas Association. Mr. Glass, you proceed.

STATEMENT OF DON GLASS, ALASKA OIL & GAS ASSOCIATION

Mr. **Glass**. Thank you, Senator Murkowski, and panel. My name is Don Glass. I am with the Shell Oil Co., but I am speaking here today on behalf of the Alaska Oil & Gas Association. AOGA is a trade association whose 37 members account for the bulk of oil and gas exploration, production, and transportation activities in Alaska. Our membership includes the largest and some of the smallest petroleum firms in the industry. AOGA is a division of the Western Oil & Gas Association.

Since the original enactment of section 404 of the Clean Water Act governing dredge and fill activity in waters of the United States, and especially since the scope of the act was interpreted to include vast reaches of disassociated wetlands, even including wet tundra, the oil industry has been increasingly concerned with the difficulties encountered in getting permission to conduct its activities. I will attempt to point out the more severe problems we have working under this law and to suggest some solutions to these problems.

The principal problems which have been experienced in the oil industry, as section 404 is administered by the Corps of Engineers and EPA are as follows: First, the geographical area of jurisdiction is inordinately large. It sweeps across enormous areas of the State including isolated wetlands, lakes, intermittent streams, virtually all of the North Slope, and most other areas potentially vital to petroleum activities. The extensive regulation of the North Slope came about as a result of assertion of the so-called interim jurisdiction by the Corps of Engineers over wet tundra area in January 1979.

Second is the unreasonable delays occur. Although the statute directs that final action on a permit should be taken within 90 days, considerably longer times are not unusual. More than a year is sometimes lost in awaiting a permit decision. A recent API study revealed that in instances in which an EIS is performed in connection with a section 404 permit, the average time to obtain a permit is almost 2 years. And from the testimony of Mr. Feltz, of GAO this morning, I gather that that time is probably conservative.

Third, unreasonable stipulations are often attached to permits. The section 404 process allows Federal, State, and local agencies to propose permit stipulations which are not only beyond the scope of the section 404 of the Clean Water Act, but which are frequently beyond the regulatory authority of the agencies themselves. The corps has at times been reluctant to exercise appropriate control over the permitting process, with the result that permit stipulations have effectively limited subsequent operational oil and gas activities.

Fourth, the section 404 permit program causes unnecessary duplication and expense. Many of the lands which are the subject of section 404 jurisdiction as presently applied by the Corps of Engineers, are also extensively regulated by other Federal, State, and local agencies. The duplication of regulation of these lands results in inconsistent decisions, delays, and unnecessary expense.

The problems described above are not unique to the oil industry. They have been experienced by many different industries and private individuals, in both the private and public sectors. But these problems are being recognized. Intensive activity is currently underway by the Corps of Engineers, the Office of Management and Budget, the U.S. EPA, and the Vice President's Task Force of Regulatory Reform to cure those problems which can be handled without a change in the law. The petroleum industry, through its API wetlands task force has worked diligently with these groups in an effort to make these regulatory changes meaningful, and to do them in a way which will still provide the environmental safeguards intended by the act.

We would like to submit to the written record of this hearing the extensive compilation of industry analysis and recommendations which were formerly submitted to the Bush task force on February 4. Our association's coastal affairs committee which I chair, has worked closely with this work and fully supports its recommendations. We have great confidence that these attempts to provide more reasonable regulatory processes to implement section 404 will be ultimately successful, and look forward to their culmination.

We would also refer you to the recent National Petroleum Council's Arctic Oil and Gas Study were section 404 problems were identified as one of the most urgent problems. The solution to which could speed oil and gas development in the Arctic without harm to the environment. And Senator, you have a copy of that MPC study summary.

However, there are some highly undesirable features of section 404 which cannot be corrected by administrative changes to the regulations. They include the unreasonably large geographic area of jurisdiction and the competitive authorities of the U.S. EPA and the Corps of Engineers.

Speaking first to the area problem, we believe the legislative history of section 404 offers little to suggest that Congress intended application of section 404 controls so broadly as to include wet Tundra areas as currently implemented in Alaska. Accordingly, we recommend section 404 be amended to narrow the geographic scope of the program in Alaska to waters which traditionally have been considered navigable under the Rivers and Harbors Act of 1899.

Next, we would point out that section 404(b) of the act requires the corps to make its decision about whether and upon what conditions to grant a permit by applying guidelines issued by the U.S. EPA. Further, EPA is conveyed certain veto authority over decisions made by the corps. It does not make good regulatory sense in our view to have one Federal agency setting the policy and another Federal agency enforcing the rules. The resulting interagency conflicts lead to confusion and frustration of applicants wanting to get on with their business. This problem cannot be resolved by regulatory and administrative change alone. The Corps of Engineers should be able to independently implement section 404 to provide the necessary balance between economic development and protection of navigable waters. Thus, we propose that all administrative powers under section 404 be given to the Corps of Engineers, and that the U.S. EPA's role be limited to a consultative one.

The association appreciates this opportunity to appear before you today. We are encouraged with the prospect for critically needed regulatory relief, which is moving at this moment through administrative channels. But, we urge your attention to these additional problems which can be corrected only by changes in the law. Resolution of the problems I've described today will contribute substantially to the search, discovery, and development of Alaska's petroleum reserves so vital to the Nation's future. Thank you.

Senator **Murkowski**. Thank you, Mr. Glass. We've had our professional staff do some research in an attempt to clarify for the witnesses and the general audience that's the definition. It's my understanding, that the Corps of Engineers' definition is the only definition that Federal agencies can use when section 404 determinations are being made. All other definitions are meaningless in terms of section 404. Clarification of this point, hopefully, will eliminate some of the confusion that exists in our minds. I include that of the chairman as well. Do you have any observations on that, Colonel?

Colonel **Saling**. No, sir.

Senator **Murkowski**. Ernie, do you?

Mr. **Mueller**. It sounds good to me.

Senator **Murkowski**. That's a positive note. Maybe we did make some progress on that one anyway, theoretically. For the time being, concluded that you're the No. 1 honchc on section 404. That's as far as you're going to go.

In going through some of the testimony of both Mr. Cline and Mr. Glass, there's a couple of questions that come to mind. I notice, Mr. Cline, reference to a statement opposing proposals by the Reagan administration that would weaken the Clean Water Act, as you refer to the law, and cause more delays in the program that is already badly lagging. I, certainly, as a member of the committee, know of no official administrative position to weaken the Clean Water Act. I think, in many cases, the aspects of regulatory reform result in some groups feeling a bit insecure. I understand that, of course, and so do my colleagues. But in many of the Government programs, the enhancement of the bureaucracy and the processing is something that can be improved, and I assume you would be supportive of that as long as it didn't hinder the intent of the law?

Mr. **Cline**. That's correct.

Senator **Murkowski**. If you know of any official proposals by the current administration to weaken the Clean Water Act, I'd like to know.

Mr. **Cline**. They may not be official as yet, but the reading our people are getting in Washington is that the administration, as we understood, were to weaken the Clean Air Act reauthorization, and the Endangered Species Act reauthorization through amendments. However, as things developed, I guess the amendments were never really put forth. And that may well be the case with the Clean Water Act.

Senator **Murkowski**. It's pretty hard to pin down just who is who in Washington, as it is occasionally in Juneau. It's very easy to lay the blame on the administration because, with the exception of namely the President, it's nameless. But having sat through extensive Clean Air hearings, I know of no position formally brought to bear in any amendments that could be taken in my opinion, and it's a general and I think an objective one, to weaken the Clean Air or the Clean Water Law, although we're not into that. I think there's questions of perhaps a rebuttal against a Senator throwing in an amendment that one particular group or another doesn't like. I would urge all parties to be very objective and not generalize.

I noted that there's a reference made to an illegal operation in Juneau in your testimony. And activities at Juneau Switzer Creek wetlands is now occupied by unsightly landfill and an illegal sand and gravel dredging operation. I would assume that if there was an illegal situation that it would behoove the Federal or State authorities to take action.

Am I correct, we are taking legal action in that particular case? That's S&S?

Mr. CLINE. Yes.

Colonel SALING. Yes, sir, we are taking legal action in that case.

Mr. CLINE. That particular one, Senator Murkowski, bothers me a lot as an Alaskan traveling to and from the Juneau airport to our capital city. I think both the landfill itself is badly located and the dredge fill operation has gone on for years, and very controversial locally, and the problem has not been corrected. It's an example, I think of how section 404 may not be working so well and needs to be strengthened.

Senator MURKOWSKI. I assume that that one may have had some grandfather application. It's been there for a long time.

Colonel SALING. In this particular case, I think there was a total of five different violations. And we finally recommend this go to court. We're tired of getting cease and desist orders. So that's one we're working on. And I concur with your comments. But we're working on it.

Senator MURKOWSKI. All right. Then legal action has been initiated?

Colonel SALING. Yes, sir.

Senator MURKOWSKI. In your conclusion, you suggest that if at all possible, any new construction in wetlands go someplace else. If there's no other practical alternative—and when we generalize that 57 percent of our State is theoretically subject to wetlands classification, that's a pretty broad generalization. I'm sure in a State like Massachusetts the application of the percentage of the landmass that would be applicable to wetlands is relatively small. I think if we could come up with some practicable alternatives where are you going to put it, if you develop oil and gas and it happens to be in the North Slope, you're faced with the realities of wetland, and that's all there is to it.

Mr. CLINE. I certainly agree. I, first of all, would say that the State having 57 percent of its acreage in wetlands shouldn't be viewed in a negative sense. I think it's one of our true national treasures and it's one of the major reasons why we have such a bounty of fish and wildlife resources in the State. So, in terms of avoiding development of wetlands, I think that should be a policy pursued. It's not to say that when necessary, for example, on the

North Slope, and the locations here in Anchorage where there are no practicable alternatives. Then under the proper section 404 process, we do concede that there will and should be some development.

Senator MURKOWSKI. It's generally observed, I think, that particularly the area of the North Slope, considering the massive wetlands that are applicable, that industry has done a pretty fair job. And it's through, I think, the guidance of groups such as your own that have enabled the industry to maintain a concern and a real knowledge and take the input that's associated with your contributions and the contributions of your organization. And I certainly commend you for it.

Mr. Glass, you suggested in your testimony a rather sweeping change to amend the geographic scope of the program to waters traditionally that have been considered navigable. My understanding of navigable means anything that anybody could have ever possibly floated down at any given time. Is that in the Federal Register, or something like that?

Colonel SALING. It's just about what it boils down to.

Senator MURKOWSKI. Do you seriously think that that kind of a change could be made?

Mr. GLASS. Well, as broad as that definition of navigability is, Senator, I think it's far less broad than is the current interpretation of the corps to the waters of the United States. We refer to the legislative history of section 404. I would be the last one to sit before you and say that that legislative history is clear. But I was following the Federal Water Pollution Control Act development culminating in 1972. I think one view of the manner in which section 404 was drafted at that time, which did refer to navigable waters. And it was only a definition back in the back that said that navigable waters in that instance were waters of the United States. But one view of that very brief section, which you referred to earlier, I think it's just three short paragraphs, was that it was simply Congress saying that while that act dealt with the quality of the rivers and streams in the United States and gave responsibility for that to the EPA, that Congress wanted to reserve to the Corps of Engineers their esoteric control over discharge of dredge and fill. And that was certainly the corps' view of that until *Calloway* v. *NRDC* 3 or 4 or 5 years later. So what we're suggesting in our view is a return to what we think Congress meant in 1972. I think if you were to return the corps' purview to navigable waters and associated wetlands, but a lot of these difficult problems, some of which will remain, like the definition of wetlands, will be a lot reduced, simply because the potential area of coverage will be vastly reduced.

Senator MURKOWSKI. You indicated in your concern about one Federal agency setting the policy and another Federal agency enforcing the rule. Colonel, do you feel that situation exists?

Colonel SALING. Well, the way that section 404 is set up, EPA does have a section in the rules that we follow in section 404 policy.

Senator MURKOWSKI. So you set the policy and they enforce the rules, then, is that right?

Colonel **Saling**. No, they set the rules and we're the ones that handle the program.

Senator **Murkowski**. You set the policy or they do?

Colonel **Saling**. They do.

Senator **Murkowski**. They set the policy?

Colonel **Saling**. EPA sets the policy and we then convert it to what we call our regulatory program. I can't cite the paragraph, it's section 404(b)(1) I think.

Senator **Murkowski**. And you enforce the rules?

Colonel **Saling**. And then we enforce the rules.

Senator **Murkowski**. And this is what you're objecting to, Mr. Glass?

Mr. **Glass**. One of the elements of the recommendations of the task group was that those rules be simplified and put into a somewhat shorter version so that it would be much easier for the man on the street to understand. And for the corps also, I think.

Senator **Murkowski**. It was brought out in earlier testimony, Mr. Glass, that EPA has the final say if it goes up to an appeal?

Mr. **Glass**. The law sets aside certain areas in which EPA has the final jurisdiction. There are some areas, however, where the corps has the final say and EPA cannot overrule them. But it's all set up in the rules who has what prerogatives.

Senator **Murkowski**. Mr. Glass, is your recommendation that the entire responsibility be given to the corps?

Mr. **Glass**. It is.

Senator **Murkowski**. Rather than the EPA?

Mr. **Glass**. That it should be in one place.

Senator **Murkowski**. Now, I assume that the Audubon Society has a position on this, if not now, later?

Mr. **Cline**. Well, we feel the present program after extensive debates through the years, and an act of Congress, pretty well set the stage for the program's working now. We feel that the various agencies, both the State and Federal, with their own different expertise, strengthen the process rather than weaken it. So we would not want to see section 404 end up in the hands of just any one agency, be it the corps or any other. We think it's working right where it is now and could be strengthened there.

Senator **Murkowski**. Ernie, you haven't said anything lately, what do you think of this suggestion?

Mr. **Mueller**. Well, Senator, I think that if one reads the legislative history of the Clean Water Act, you can find that even in 1972 the debate upon the definition of waters upon the United States indicates that that definition was to be used as widely as possible. And that, essentially, was the key that led to *NRDC* v. *Calloway* court case, to mean that the waters of the United States encompassed virtually anything that was damp. The Corps of Engineers further interpreted that in their definition. Congress was fully aware of that particular debate when it essentially affirmed the Corps of Engineers' three phase program in 1977 and the amendments that were made to section 404. I think that the possibility of there being a broadest scale change as Mr. Glass suggests, really is pretty remote.

Senator **Murkowski**. Well, it's obvious that there wasn't a great deal of consideration given to Alaska's particular needs and requirements when the legislation was put together. That's certainly evident. Like one of the observations the other day in the Environment and Public Works Committee, the court came down with an opinion that a dam is a point source of pollution. I'm sure that if you went back to the legislative intent, you would find that they didn't think of that. But, it's certainly there.

I want to thank you gentlemen for your testimony. I think it's been most constructive and certainly balanced. And we appreciate it very much.

Our next witness is Mr. Roger Herrera of Sohio and Mr. Tim Derigo of Arco. I would ask that you gentlemen be seated at the witness table and we will look forward to your testimony.

Mr. Herrera, you may proceed.

STATEMENT OF ROGER HERRERA, MANAGER, EXPLORATION, SOHIO ALASKA PETROLEUM CO.

Mr. **HERRERA**. Thank you, Senator Murkowski. Senator and committee members, my name is Roger Herrera. And today I'm representing Sohio Petroleum Co. I would like in the interest of time to precede the written remarks that have been prepared, Senator, and would ask that they be included in the record together with a more detailed analysis which was accompanying these remarks which covers specific cases with much more care and depth than time allows at this juncture.

Senator **MURKOWSKI**. Without objection, your entire submission will be included in the record.

Mr. **HERRERA**. Thank you. Basically, my fundamental argument in joining the ranks in opposition to parts, at least of the section 404 discussion, is a historical remark which suggests that the Prudhoe Bay was constructed and planned before the onset of section 404 regulations. It in fact, was designed and put together with very little oversight of the statutory regulatory, or stipulatory. And I think it stands on its own record as an excellent example of how a joint oil field should have been planned, with due protection to the environment.

Since that time, since the onset of section 404 the activities which have taken place in Prudhoe Bay have in fact, been planned and constructed in exactly the same format as they were originally. Despite section 404 protection, the results are no different from those prior activities. My point is, that we have a great example of an oil industry action in a very fragile environment which stands out today as an example, despite, not because of section 404.

Some of the many contraversial permitting problems which Sohio has had to deal with, and I should perhaps say that my remarks are going to be focused on the North Slope. I make no apologies for this, because the North Slope affects all our lives today. We all use oil and gas both in Alaska and the rest of the Nation from the area. And no doubt, in the future will continue to use more of it. My remarks are restricted to this area, and perhaps, they might be somewhat more harsh than other people. The reason for that is that Sohio has been a leader in the exploration and the development on the North Slope and therefore has borne the brunt of problems which have come to light in that area from section 404.

To define some of the problems which the regulations have imposed have been the delays, which perhaps now is past history, but is worth mentioning, which the Gravel Islands and the Exploration Islands, were subjected to. Similarly, the permitting for the multibillion dollar waterflood project was subjected to stipulations which I think quite clearly can be challenged as being unjustified, also delay. Sohio's Kaparuk River crossing, which is designed purely to develop and produce part of the oil column in the western part of the Prudhoe Bay field has encountered permitting problems through section 404.

These problems, I think, are worth expressing very clearly, are not the result of any intentional slowing or burdening of the process by the administrators, but are the process itself.

The examples which were formulated to improve the process, namely the general permits, have turned out to be no connoiseur to the oil industry, at least on the North Slope. We are finding that those permits are so narrow as to be inapplicable in 99 cases out of 100. Everything we do out there is perceived to be contraversial, therefore, not covered by a general permit. Even when a simplistic operation, apparently within the guidelines of the permit is proposed, we do find that we have to go to all the commenting agencies before we ever submit the permit. If one of those, for any reason, either within its jurisdiction or outside, objects to that general permit, we then have to go through the time using process of normal permitting procedures.

As a result of the many difficulties which we have experienced over the past few years in our operations on the Slope, Sohio participated with other companys, and members of the American Petroleum Institute to develop comments on this subject. These were submitted to Vice President Bush's Regulatory Reform Task Force. We also, in accordance with the results of those studies, and in accordance and compatability with the task force's own conclusions, wrote language for a set of new regulations which we believed could substantially improve the process now overseen by the corps.

Colonel Saling went through the points which were raised by the task force concerning regulatory relief, and I won't repeat them. Needless to say, Sohio totally approves and endorses the nature of those results and we urge that they be strongly considered as a means to beneficially modify section 404 and section 10.

With regard to legislative action, to modify these problems, it's difficult at this stage until the OMB charter has been put into force and rulemaking procedures have been established, to suggest specifics. However, in my written testimony, there are five specific proposals for legislative changes. I won't read them. They are written in legalese, which is hardly comprehensible, but nevertheless, they should be of benefit to the staff.

In concluding, Senator, we believe that the corps-regulated program should be reformed and it should not cover the regulation of State and private wetlands in Alaska. There is adequate justification for this conclusion, not only from our own experiences, but also from the opinions of everyday Alaskans as indicated last year in responses to questionnaires, which were submitted to Senator Ted Stevens by his constituents. In that questionnaire, only 10.9 percent of the 6,700 responding Alaskans felt that the Federal Government should be regulating Alaska wetland areas. This appears to be in stark contrast to much of the testimony you've received today, especially from some of the agencies involved. It's obviously a situation which is beloved of agencies, for reasons best known to themselves, but is somewhat less liked by Alaskans in general.

We think that the Federal regulations governing the Corps of Engineers' permitting processes have been grossly distorted over the years and are now far different in their effect from the original scheme intended by Congress when Section 404 was originally adopted. Changes to the corps' mechanisms therefore are essential especially if significant delays and added unnecessary costs are to be avoided in the development of our future energy resources on the North Slope of Alaska.

As has been mentioned, Alaska, no doubt has very substantial future sources of energy which will benefit this Nation. But to a large degree, our energy future hinges on a reasonable and reasoned approach to problems we've discussed here today.

We urge you, Senator, and your committee, to take the lead in establishing the regulatory and legislative relief from the Corps of Engineers process in order that this oil and gas potential in Alaska can be realized to everybody's benefit.

Senator MURKOWSKI. Thank you. Mr. Tim Derigo of Arco, would you proceed?

STATEMENT OF TIM DERIGO, ARCO ALASKA

Mr. DERIGO. My name is Tim Derigo of Arco Alaska, Inc., a subsidiary of the Atlantic Richfield Co. I'm the senior land man for the company and have had firsthand experience with the section 404 permit process. Furthermore, my department is involved in every section 404 permit application that the company filed with respect to its North Slope production operations.

As you requested, I'm limiting my comments today to a summary of the full written testimony we have previously submitted to the hearing record. We now ask that it be incorporated there.

Senator MURKOWSKI. Without objection, it will be incorporated in its entirety.

Mr. DERIGO. Thank you. Included with our written testimony are five case studies which illustrate the principal problems we have experienced with the present section 404 permit program. We appreciate this opportunity to discuss with you the impacts of the section 404 program on Arco Alaska's production operations.

We fully support the fundamental intent of the section 404 program, which is to insure that the discharge of dredged or fill material does no damage to surface water quality. However, the scope of this Federal program, has, we believe, been unnecessarily expanded over the years by judicial interpretation and regulatory decisions. The result too often has been excessive cost and delay incurred with little or no corresponding environmental benefit.

Arco Alaska's experience with section 404 program in Alaska has shown that the jurisdiction of the corps over the tundra is unnecessarily broad. With respect to oil and gas activity, existing State law and permitting procedures provide ample protection for the tundra. The corps' ability to effectively mediate disputes between an applicant and reviewing agencies is limited far beyond what we believe was originally intended by the Congress. The lack of specifics in the Federal Clean Water Act and implementing regulations allow imposition of permit conditions that are neither germaine or cost effective. The multiple layers of review provided by the present section 404 permit system embody redundancy and overlap and promote delay in permit processing. The lack of binding deadlines in the statute also leads to unnecessary delay. Last, the current Alaska general permits have provided little real regulatory relief to date.

We are encouraged by the current efforts of the corps to affect regulatory reforms in the current section 404 program, that could ease the situation considerably. However, regulatory reform alone will not produce a complete or lasting cure. Therefore, we recommend that Congress amend the Clean Water Act to (a) give States such as Alaska more authority over their wetland resources through a two step process. Step One: Limit Federal jurisdiction under section 404 to those waters and immediately adjacent wetlands which are critical to the water quality purposes of the Clean Water Act. Step Two: Revise the process for delegating to the States primary enforcement authority for wetlands under section 404. As presently constructed, the section 404 delegation process is so cumbersome, that no State has yet been willing to take on primacy. The delegation provision should be amended to require the EPA and the corps to grant primacy to those States that have programs in place which meet the statutory requirements of section 404.

For those areas for which the corps retains authority under section 404, we recommend (*b*) specify that the corps is the authority for the issuance of permits and the determination of appropriate conditions. And that the other involved agencies serve only in the capacity of advisers to the corps, (*c*), require the corps to establish cost effectiveness as a principal criteria in evaluating alternative permit stipulations. If a more costly condition is imposed, the corps should be required to justify that decision, (*d*) require the corps and reviewing agencies to demonstrate that any suggested permit stipulations are directly related to the water quality purposes of section 404 and other primary and environmental effects of a project as a result of a change in water quality. For example, those other primary environmental effects could include compliance with the National Environmental Policy Act or the Endangered Species Act. Such a requirement should rule out the imposition of unnecessary data-gathering and study requirements designed to collect information at the permittee's expense, (*e*) strengthen the general permit provisions to require rather than merely allow as in current law, the use of general permits for activities which are similar in nature, cause only minimal environmental effects when performed separately and will have only minimal cumulative adverse effects. Further, the corps should be required to demonstrate that any conditions written into a general permit are based on a prior area-specific operating experience whenever available, and mitigate adverse environmental effects that have some reasonable likelihood of occurring as a result of the specific activity for which the permit is required.

Taken together, adoption of these recommendations will do much to eliminate unnecessary cost and delay while insuring that the purposes of section 404 are met. I will be happy to answer any questions you might have. But before doing so, I would like to comment on some of the exhibits that we have brought. And I don't have written comments on this. So I'm just going to comment on this first one from the table here. That is a photo mosaic, I believe taken in 1981, is that right? Of the existing Prudhoe Bay field development. Arco operates the half—approximately of the developed area on the right-hand or eastern side of that photo mosaic.

Prior to 1979 most of that activity had occurred. And that was before the Federal process was invoked for the North Slope. On Arco's side, there are only four major projects that were permitted and built with the benefits of Federal advice. We were up there with the staff, I believe you know, Senator, on Tuesday, and I pointed out which ones those were. If I did not know, I would be hard pressed to point them out to you right now. I think that makes a point, when earlier I said that the Federal process employs overlap in redundancy, and I think it further makes the point that the Federal process is redundant of the State process for oil and gas activities on the North Slope. The State has a comprehensive program. And by the fact that you can see that there really has not been any design change as a result of the Federal review, I believe that makes the point that the Federal process protects the environment no matter than the State process does.

I have an exhibit behind that one and I have to get up to present it to you. I asked the staff if you had seen or had available a copy of the 1979 public notice. I have copies of that with me. This is the public notice that extended interim corps jurisdiction to Alaska.

Senator MURKOWSKI. These are copies of the same public notice?

Mr. DERIGO. Yes.

Arco prepared a land map for its own use. And a couple of years ago, after we looked at that public notice again, we thought it might be helpful if we knew where the corps said the tundra was and wasn't with respect to that land map.

Senator MURKOWSKI. What's the corps center?

Mr. DERIGO. We took the Corps of Engineers' public notice to our drafting department, and they projected the lines from the public notice onto that land map. So if you start at the coastline and come to the first kind of wavy line up there, that's the landward limit of the wet tundra area. Then you see a couple of pockets after you get out of wet tundra which presumably is wet tundra again.

After we did that, we took it over to the corps, the people that process the permits, and said, OK, now we've got a map that we rely on. In other words, if we have a project that doesn't fall in the wet tundra, do we have to get a permit? They said, yes, you have to get a permit. So in effect, what the corps has done with that 1979 public notice, even though they assert interim jurisdiction only over wet tundra with respect to the North Slope, one has to get a permit for all oil and gas activity in that area.

I guess it's possible to request the corps to go up for a particular project and make a determination whether it's wet or not, to my knowledge we've never done that. I don't know whether the corps ever has. But if they have, I don't know about it.

There's one thing that I would like to point out though on that map. In this area right here. This is the Kuparuk River unit, basically the west side of the Prudhoe Bay field. This area was developed first. Then last year we had the most extensive permit submittal program to develop phase 2 of the Kuparuk development. And it goes out this way. As you can see, according to this map, based on the corps' public notice, most of that, would have been in areas that are not wet tundra.

Senator MURKOWSKI. That were not classified as wetlands by the corps or by notice?

Mr. DERIGO. According to the public notice. The point I'd like to make, by pointing that out is, that with respect to North Slope oil activities, what we have is uncertainty now as to where the process applies and where it doesn't. And with respect to uncertainty, uncertainty translates into costs. And we can say why, I think you're aware of those. That's the point I wanted to make by looking at that now, thank you.

Senator MURKOWSKI. Thank you. We appreciate that.

Perhaps, we should start out with a comment from Colonel Saling. Are you familiar with the application of the permits as they apply on the North Slope and the current situation with regard to this?

Colonel SALING. Let me just read some of the handy-dandy guides my people provided me. In Alaska, there are eight commonly accepted vegetation communities. These vegetation communities include wet tundra, moist tundra, alpine tundra, high brush, bottom lands spruce, hardwood forest, lowland spruce, upland spruce hardwood forest, and lowbrush bock muskeg. Each of these vegetation community types can contain areas that fit the definition of wetlands. In our experience, it is shown the potential for existence of wetlands in each type is approximately as follows: wet tundra, the line there, 100 percent. Moist tundra, which I suggest probably lies on the south side of those lines, 95 to 100 percent. High bush, 60 percent, bottomland spruce, hardwood, 60 percent. And the rest of the figures go on up to Alpine tundra which has the potential for wetlands up to about 15 percent. The point I'm making is that that may be a line for wet tundra, but anything encompassed by those lines could be one of those other bios which could in fact include additional wetlands. Now the specifics of the particular case, I'm not sure I want to get into.

The point that I'm making is that those lines probably are reasonably accurate, but within those, you may find any of those other bios which may in fact include wetlands, and the only way to determine the wetland, is as we discussed before, is to go on the site to take a look at it. So that would be my comment.

Senator MURKOWSKI. Well, having been up on the North Slope, many, many times, there's a lot of it that's all the same, and some of it that's different.

Mr. DERIGO. Oh, yes.

Senator MURKOWSKI. Commissioner Mueller, a statement was made in the testimony of Mr. Derigo, an observation that as presently constructed the 404 delegation process is so cumbersome that no State has been willing to take it on, initially. And that is the case. Do you necessarily agree that there is some concern? We've acknowledged that no State has taken it on, and no State has more priority than us, and we're still taking a look at it. As I understand it, if you took it on, you would basically replace the responsibility of the corps; is that right? But you would still be under Federal EPA ultimately; is that about right?

Mr. MUELLER. As I mentioned in my testimony, there are some phases of the program that could not be assumed by the State.

Senator MURKOWSKI. Right.

Mr. MUELLER. Essentially those areas which would also be subject to section 10 permit.

I can't speak for all the other States that haven't taken over the 404 program. But there are a variety of reasons, one of which is the cost of managing the program, which is now absorbed by the Federal Government, and would have to be picked up by the State. One of them is the fact that a certain amount is cumbersome to the process of having a program delegated by EPA. We've been through that several times. We don't feel that this will be a whole lot different.

Senator MURKOWSKI. Mr. Herrera, have you, as an industry member representing your corporation, worked with your association in meeting with the corps as an industry group to try and resolve some of what you contend are inconsistencies, or do you find it better to go it alone?

Mr. HERRERA. Senator, as far as gaining permits for operations in Alaska, we go to the corps usually before we ever file the permit and discuss the situation with them in as much detail as possible. That prepares the way. As far as our dissatisfaction with the present regulations and efforts to change them through the American Petroleum Institute and by our own efforts, yes, we have talked to the corps specifically on that issue.

Mr. DERIGO. Senator, could I comment on that issue as well?

Senator MURKOWSKI. Go ahead.

Mr. DERIGO. Thank you. Roger talked about inconsistent agency policies. I believe that the 404 program is made up of so many inconsistent statutory policies as well. We recently had a project—and I know several people in this room will know what I'm talking about—where Glen Akin's agency was put in a position to potentially have to deny the 404 water quality certification. They told us and told anybody that asked them that they didn't have a water quality concern. But because of those inconsistent statutes, and because they had a good faith position with respect to the State coastal zone management plan, they were in the position of basically having to deny the 404 permit when they didn't have any water quality concerns. Now, it was only because, I believe, we had a good working relationship with the State and all the agencies in the permitting process that we could work around that problem. The point I'm getting to is this, the 404 program is really not a program at all. It's a hodgepodge. It's kind of patched together. It's not a consistent program. And I believe that situation vividly points that out.

Furthermore, I don't think the present program is required by anything. It's not required by the statute, it's not required by the cases. It's an attempt to patch together a lot of inconsistent statutes and make a coherent program out of it. I think it's just about impossible. And I think that case points it out in one respect.

Senator MURKOWSKI. Your comment that the development and the record of Prudhoe Bay, in spite but not because of is one that merits some reflection. I think the industry has done an outstanding job, as I have stated, in developing this environmentally fragile area of our State. The opportunity to have input from those that are extremely interested in the environmental consequences of development, has to have a balancing effect in whether or not it's represented as a result of the 404 application or the integrity and commitment of the industry. I think that you would agree that that balance has been part of the developing scene in Alaska where the development aspect is tempered by the environmental concern, and hopefully, as a result of that you have a better project because of it. I can certainly appreciate your concerns with regard to the duplication that exists. I think that the recommendations made by the White House Committee and Vice President Bush to try and eliminate this redundancy certainly has a place in this type of legislation. I want to thank you for your testimony and appreciate the fullness of it and the documentation that you have submitted for the record, and particularly the examples given that will assist the committee in deliberating various recommendations made by your industry groups. Thank you.

Mr. DERIGO. Thank you, Mr. Senator.

Senator MURKOWSKI. Mr. Lowell Thorsness, Viking Realty; and Dr. Sig Restad of the University of Alaska Experimental Station, Palmer, Alaska. Who want to go first? All right.

STATEMENT OF SIGMUND RESTAD, ASSISTANT DIRECTOR, AGRICULTURAL EXPERIMENT STATION, UNIVERSITY OF ALASKA

Dr. RESTAD. I'm Sig Restad, the assistant director ag experiment station, and I would like to congratulate the committee on having a hearing regarding the Clean Water Act designed to help clean up the act.

I have some colleagues that I have worked with prior to the hearing and I'd first like to offer the written testimony prepared by Dr. Sam Reiger, Alaska Soil Scientist, retired. He would be here today, but he is presently in the lower States. Dr. Reiger speaks with an excess of 20 books experience and leadership in Alaska Soil Survey, has personal knowledge of conditions in Siberia and other northern latitude areas, and is author of a recent book, "The Genesis and Classification of Cold Soils," presently in the process of publication. I recommend his comments be given a lot of consideration because he speaks with years and years of knowledge and experience.

As for myself, I'll try not to get into the technical terms of the wetlands issue, but I'd like to point out some of the concerns and illustrate some of the things that are unique to this latitude and geographical location. I'm sure that this committee is familiar with the goals of the wetlands legislation. But for review, let me quote from appendix DEO 11990, protection of wetlands, a Presidential statement.

> Wetlands are areas of great natural productivity, hydrological utility, and environmental diversity, providing natural flood control, improved water quality, recharge of aquifers, flow stabilization of streams, habitat of fish and wildlife resources. Wetlands contribute to the production of agricultural products and timber and provide recreational, scientific, and aesthetic resources of national interest.

I recommend these goals be kept in mind when classifying and administering wetland policy in Alaska.

My understanding is that for the purposes of classification, wetlands must have one or more of the following attributes—and the various discussions have brought out the definition aspects. One of those attributes—at least periodically, the land supports predominately hydrophytes. This attribute is of greatest concern to me in the classification process because the so-called hydrophytic plants go almost everywhere because of Alaska's low evapotranspiration rates and long periods of permanently frozen soil conditions. Natural changes in the environment such as fire or the removal of insulative vegetation would change this condition. I might comment, Senator, you mentioned the 90 degree temperature in Fairbanks today. And they've had it for some time. And I suspect that if they have it for a few days more, vast areas of what is now classified as wetlands would be subject to fire. And 2 or 3 years from now, that classification would be entirely different because the land would thaw down and the vegetation that is presently there is climax vegetation and is the crop of the day. It is not necessarily a permanent situation at all.

Two, the substrate is predominately undrained hydric soil. This attribute is of concern because it often occurs in natural conditions, but often fire and clearing, again, would change it. Some of Alaska's best soils or agricultural soils fit under this category.

The substrate of non-soil is saturated with water or covered by shallow water at some time during the growing season each year. This attribute has potential impact on about 25 percent of Alaska's potential farmland. Dr. Reiger made comment on that particular item in which vast areas of the agricultual production in Siberia would fit under land of similar category.

In the same Presidential statement previously mentioned, it stated that over 40 percent of 120 million acres inventoried in the 1950's have been lost. This is of great concern, but it is obvious that Alaska was either not considered in that—in the statistics or a criteria other than that above was used, because Alaska would have more wetlands than the total inventory for the inventory indicated.

Wetlands are not unique in Alaska by whatever definition you measure what we have. Agricultural lands are unique in Alaska, with only about 5 percent of our land mass falling into the class II or III category with about one-half of that or less available for potential development under present land use ownership and policy. The Soil Conservation Susitna Survey covers about 730,400 acres and could have 57 percent or 420,000 acres classified as wetlands under presently perceived criteria. About 109,000 of that 57 in the loam-type soil with significant agricultural potential. If the perma frost floodplain areas of the interior were to be classified as wetlands, it would impact upon much of the higher potential agricultural lands. The best agricultural lands presently in the Tanana

Valley are in those areas, which were once permafrost and have been cleared and thawed down and are no good agricultural soils.

A wetland classification of soils not based upon goals of the legislation could greatly increase the administrative workload of the agencies involved, increase the time and cost required for development of some lands, and possibly prevent some good agricultural lands from development.

In summary, I would like to emphasize the need for the classification of only those areas that would be required under the goals of legislation, review the classification policy, and make necessary changes in the definition required to fit Alaska conditions. There are qualified people available in the state if given the opportunity to contribute, to help with these definitions.

Concentrate on limited wetlands support available on those areas and—that do present significant problems or potential problems, encourage the development of lands that presently have an excuse for development and do not present a problem in—as far as wetlands are concerned.

I'm representing here today a group of colleagues that I work with on a cooperative basis between the University of Alaska and this group. And that is the Alaska Soil Conservation District. I have a statement prepared by them and a directory of their participants and their various board of directors in their State association.

Senator **Murkowski**. It will be noted in the record.

Dr. **Restad**. They have also developed a resolution which they have included in their record for changes in classification of—that would go in the Western Directors of Agricultural Hearings Procedure. Included in their recommendations are a list of soil types that they feel could be adequately taken out of the present wet category of soil class—or the wetlands classification.

Senator **Murkowski**. Thank you Mr. Restad. I appreciate that very expert and well thought-out testimony. I believe that if an area is farmed or if there's an agricultural activity taking place, it's automatically exempt from the wetlands classification.

Dr. **Restad**. This is true, Senator, if it is being farmed. If you are developing new lands, then it does not fit that category. We presently had that experience in developing new lands that are our agricultural experiment station in Homer recently.

Senator **Murkowski**. When you're clearing land, does that constitute an agricultural process?

Dr. **Restad**. According to the Corps of Engineers, clearing constitutes a dredge and fill operation.

Senator **Murkowski**. Mr. Lowell Thorsness, Viking Realty.

STATEMENT OF LOWELL THORSNESS, VIKING REALTY, ANCHORAGE

Mr. **Thorsness**. Good morning. My name is Lowell Thorsness. I'm a realtor with Viking Realty in Anchorage. I've lived in Alaska for over 43 years. In the spring of 1978, Mrs. Eileen Marshall, a client, called and inquired if I had knowledge of anything that could be done economically to dispose of lots 26 through 41 in Marshall subdivision, second addition, which is located on Big Lake, a very large recreational area about 65 miles northwest of Anchorage. I would like to show you the maps here.

This is Big Lake right here. And then just thousands of acres of wetland north of Big Lake. And right down by that little arrow, there's a little tiny white spot, which right in there, and that is the spot which we have in question. One more map here which I have outlined in yellow shows the definite wetland north of Big Lake again. Because there's a lot of that white in there too the corps has decided that is wetlands around Big Lake. This is only this marshy area. The area that we have in question isn't even marked in white for swamp on there down below on Big Lake. This is the subject that we have in question here. And here's the lake. And these are the lots going around those in here.

Senator MURKOWSKI. We've got the maps and recognize the future boat channel. Why don't you proceed with the summary of your testimony.

Mr. THORSNESS. I would like to have it noted too that this was recorded in 1959, in May, which would be before statehood, this would be showing the boat channel on it.

Mrs. Marshall stated the tax burden was getting heavier and she would like to sell the entire group. She asked me to inquire as to the excavation costs and the value of the land before and after excavation of the channel that is shown on the recorded plat. She stated she did not want to get involved in development, but it if looked economically feasible, she would want to sell the package. The back portion of all these lots is well timbered, and there's a road to each and every lot. I told her I might be interested in purchasing it or I would find her a buyer. I contacted an excavator near Big Lake, Mr. Ed Beach, and he told me he could do the excavation during the winter if we were ready. I made immediate contact with the Planning Department at the Mat-Su Borough, and they said to go ahead as the plat was recorded in Palmer Recording District in May of 1959, which was before statehood. But they said that I should check with the Alaska Department of Fish and Game before I proceed. I contacted them and explained we wanted to excavate the channel as per the recorded plat. They reviewed the plat in a timely fashion. And on August 7, 1978, they put their blessing on the project if the following conditions would be complied with: one, fill materials would not be placed within 10 feet of the channel or the lake edge; the bank slope would be two to one instead of one to one as proposed; a plub would be retained at the end of the channel until excavation is completed to prevent siltation to the lake during excavation.

At this point, they asked me if I had checked with the Corps of Engineers, if not, do so. I went immediately to the corps, hoping to be done in time for the winter excavation. I was directed to the regulatory function branch where Mr. Butler and Mr. Wolf courteously informed me as to what was necessary to apply for a permit. I hired a draftsman, got it back as soon as possible. The corps sent the notice out on November 3, 1978. We were still hoping for a February excavation. There is no open water or stream on the property. But the corps hydrologist stated there was running water under the surface of the channel, would not be stagnant water. When the governmental agency received the notices, EPA and National

Marine Fisheries deferred comment to the U.S. Fish and Wildlife Service. December 14, 1978, U.S. Fish and Wildlife Service answered the corps notice and referred to the Alaska Department of Fish and Game role in stocking the lake after the State had already given us a permit. U.S. Fish and Wildlife said they wanted to wait for the next growing season for on-site inspection. The crowning blow was their statement in their answer to the corps that they did not have enough information and requested that the permit be held in abeyance until the corps provided them with their environmental assessment.

This in turn, fired up the corps which answered on March 6, 1979, quote, copies of our environmental assessments and 404(b) evaluation are available only after processing of an application is complete. This was signed by Col. George Robertson. On June 18, 1979, a letter to Colonel Robertson signed by John Morrison of the U.S. Fish and Wildlife Service responding to the colonel's refusal to give them his evaluation, they answered, quote, based on available information, the Fish and Wildlife Service cannot condone issuance of permits for projects as described in public notices, end quote. It further stated that they would re-evaluate their position if given additional information. Here we were in the middle of a fight between two governmental agencies.

On October 26, 1979, EPA and National Marine Fisheries joined in the kill and wrote letters to the corps asking the permit to be denied. We asked if the only alternative for Ms. Marshall was to keep paying taxes for the rest of her life, and then her daughter could pay taxes on it for the rest of her life. Their answer was to drive piling for the full length of the swamp for a full length dock and then individual docks out to each lot. Which I want to add is the most idiotic thing I've ever seen them come up with. Each owner could leave his boat at the end of the swamp and walk through the mosquitos to his cabin.

I inquired of Fish and Wildlife about if it was economically feasible. They replied that they didn't consider those things. I sent a letter of rebuttal on all points, met with representatives of the corps, to no avail. I asked to talk with the colonel at the corps, and/or the head of Fish and Wildlife Service. This was also refused. On August 28, 1980, we received the coup de grace from the corps denying us a permit to place 5,500 yards of dredging material on approximately eight-tenths of an acre of land—wetlands at Big Lake, signed by Col. Lee R. Nunn.

My client feels if the Government wants to stop her from developing the property as platted, then they should buy it at the MAT Appraised price.

Senator MURKOWSKI. Well, I wondered when we were going to get down to the first horror story. And you've given it to us. And I thank you. A couple of observations and then no particular questions. Dr. Restad, I think your statement with regard to the changing status of agricultural land or land that may be classified as wetland, and because of fire or natural changes would reclassify itself is an important one that we should recognize here in Alaska where we do have that exposure.

My question to you, Mr. Thorsness, is: Does your client plan to appeal this or is she pretty well exhaustive?

Mr. THORSNESS. At the corps, I talked to Mr. Carruth and he said there wasn't no appeal. This is it. We've made a decision and there isn't an appeal.

Senator MURKOWSKI. I wonder if it would be appropriate to, Colonel Saling, to have a member of your staff meet with Mr. Thorsness to see if you can resolve any other alternative or appeals process. Is that appropriate?

Colonel SALING. Yes, we can do that.

Mr. THORSNESS. I'd sure like to.

Senator MURKOWSKI. I'm not suggesting that you're going to get any change of it. But it appears that there would certainly be a break in some of the communication. Because it's certainly not the corps' intention to not see land developed for recreation purposes, I think that's safe to say.

Colonel SALING. I would point out that we will still, of necessity, go back to the other resource agencies to determine what their view is at the present time, given that this has been a while since it was orignially broached. We'll have to go back to those other resource agencies and reopen or redicuss the case. There is no guarantee at all that the outcome will be different. But we will certainly sit down and chat with you.

Mr. THORSNESS. I'm just curious. What happens in her case? She contends that she has it. They say her land is wetlands. She subdivided in 1959. She sits there. If they turn it down, that's her only alternative, to sit there and pay taxes the rest of her life. That seems sad, doesn't it?

Senator MURKOWSKI. I agree with you. I don't think that's necessarily the end of the appeal process. Might I defer to staff as far as if the corps denies, I assume you can appeal to EPA. But the likelihood of EPA overruling the corps, I assume is rather remote. Is that the case?

Ernie, do you have any observations on what we've done in the State in the Big Lake recreation area?

Mr. MUELLER. I sure don't have any ideas.

Colonel SALING. I guess the district engineer made that decision. I guess the next appeal would be to the division engineer. So there is an appeal process.

Senator MURKOWSKI. I would like to think that our Government agencies can be responsive on a person-to-person basis. If they can't then I think it's an obligation of the congressional delegation to personally become involved to see if we can't expedite the process. But decisions are allegedly made on the basis of a professional decision affecting the general public welfare. And obviously, from your testimony, it's pretty difficult to make that observation on the merits that we have before us. Nor is this the place to do it. But I think Colonel Saling has indicated to you that he is willing to direct a member of his staff to sit down and discuss the circumstances, and I'll be looking forward to a response to see just what the nature of the problem is to see if we can't resolve it. I know it's not the purpose of the corps to deny permits just for the sake of denying them. Their responsibility is generally the public welfare.

Mr. THORSNESS. At that time, the people at the corps told me, as long as these other agencies—the three of them, all got together and came in and said no, you're all washed up.

Senator MURKOWSKI. Well, we have a dispute between Federal agencies, and they can't resolve it themselves, we can always call them in and ask that they sit down and resolve it at a given time. That is occasionally done. But usually, it's not necessary. I would hope that we can respectfully respond to the best interests of not only your client, but the public interest as well.

I thank you, Mr. Thorsness, and I thank you, Dr. Restad. Next we have Ms. Paula Easley, with Chester Cone, Jim Dye, and Don Benson, representing Alaska Resource Development Council. I believe Darlene Ruiz is accompanying the group as well. Mrs. Easley, I assume you might wish to start since you're the first one on my list.

STATEMENT OF PAULA EASLEY, EXECUTIVE DIRECTOR, RESOURCE DEVELOPMENT COUNCIL

Ms. EASLEY. Yes, Mr. Chairman. I'm Paula Easley, executive director of the Resource Development Council, which is a statewide citizens group with a membership of some 10,000 individuals, corporations, labor unions, chambers of commerce, municipalities, and trade associations.

The focus of the council is to create a broadbased diversified economy in Alaska, stable employment, orderly growth, and improved living standards for Alaskans, while at the same time providing for reasonable protection of the environment we all cherish.

Our efforts are directed to laws and policies that enable orderly development to occur. Of high priority is regulatory reform.

Late in 1977, we began alerting the public to the implictions for Alaska of section 404 amendments. The council foresaw the amendments to have potentially dire effects on development in alaska. And of course, our concerns have been realized. Section 404 and its progeny will continue to have serious negative impacts upon the growth and develoment of Alaska.

Time and time again we have seen private property rights abused by legislation which Congress did not even intend to be preservative in nature.

The council recognizes the importance and value in preservation of some wetlands, but maintains that the current presumption in favor of recognizing all wetlands to be valuable removes conservation efforts from the realm of common sense.

The council has recommended that zoning classifications of preservation or conservation as they relate to private property allow for adequate compensation by the zoning authority. Private land left in the preservation classification allowing for no development should not be taxed. We have also urged that wetland mapping programs adopt consistent terminology as well as definitions that reduce the ambiguity and unfettered discretion which is symptomatic of the current program.

It is our belief that these recommendations do not go far enough and our testimony today will suggest additional measures we would like Congress to consider.

Our first two witnesses will explain the serious problems they have experienced in obtaining 404 permits. They are Donald Benson of Palmer and Chester Cone of Kenai. The third witness is

James G. "Bud" Dye, a long-time resident and civic leader who will express a different perspective on the impact of section 404 permitting.

Our final witness is Darlene Ruiz of the Pacific Legal Foundation. We asked Mrs. Ruiz to assist us because of PLF's involvement in a number of Alaska wetland cases.

I might mention that the council had requested that three other individuals testify today, but they were unwilling to do so for fear their pending permits would be jeopardized by public criticism of the permitting agencies.

My introduction has taken 2 minutes. I'm going to give the rest of my time to Darlene for her conclusion. Do you wish to withhold questions until we have all finished?

Senator MURKOWSKI. Yes, Ms. Easley, I think that would expedite the procedure. So please proceed with your panel group.

Ms. EASLEY. Fine. Yes, then Don Benson will begin.

Senator MURKOWSKI. Go ahead Mr. Benson.

STATEMENT OF DON BENSON

Mr. BENSON. My name is Don Benson. And in 1978, I purchased a piece of property from a Palmer resident. And this property is located at mile 33 on the Glenn Highway.

In 1978 I obtained all the local permits for the development of an airstrip and an aircraft maintenance facility. And I started work on the project.

In March 1979, I was given a cease-and-desist order by the Corps of Engineers, at which time I immediately halted my project.

Corps personnel then visited the site. As a result of the inspection, the corps notified us on June 18, 1979, that development was permitted subject to conditions of a nationwide permit. The development did proceed for a period of 2 years and 7 months before I learned of the corps cease-and-desist order.

On January 12, 1982, another cease-and-desist order was given and heeded. On January 26, 1982, an application was filed and we went into the process again.

It has since been learned that the re-review of this was initiated on the objections made by the U.S. Fish and Wildlife Service long after the comment period has expired.

It has been 4 years now and our project has yet to be completed. All this time, I continue to pay taxes and mortgage payments. The total financial impact cannot really be measured. But I estimate my losses at about $250,000.

The corps continues to tell me that the project is not in the public interest. Yet I have a petition that has been circulated only 3 weeks with over 275 signatures of Alaska residents from our area who support our project. The petition represents more than a combined total of 6,000 years of Alaska residency.

I feel that the denial of citizens to develop their private property should be stopped. And I hope this committee will act to stop the violation of property rights. I am sure if need be, I can produce over 500 signatures of residents from our area that support our project. This proves that the permit process is based on the feelings only of the Government agencies involved and on the real public interest expressed by citizens.

In closing, I would like to add that only about 200 feet from our property between our property and the creek, the Alaska Fish and Game hauled in gravel for a road. The corps was notified and in less than 1 week, it was determined that the property involved was not a wetland. The corps own survey shows this property to be identical to the property I'm trying to develop. Thank you for your time. And I will be available if I can be of any assistance to this committee in the future.

Senator **Murkowski**. Thank you, Mr. Benson. I believe, Ms. Easley, are you going to introduce you next witness?

STATEMENT OF CHESTER CONE

Mr. **Cone**. Ladies and gentlemen of the committee and audience, my name is Chester Cone. I appreciate the chance to tell you people today of the great problem that I have had with the permit process and to give you some of my—the solutions that I think might help to solve the thing.

First of all, I may run just a little bit overtime, but what I have to say, I think, is pretty important. And I've lived with this monster for 4 years. So I hope that you folks will tolerate just a few minutes of your time. I'd like to say also that during this period of time that the local district has gone through three colonels, including Colonel Saling now. And I hope that he will be the last before my problem is resolved.

My name is Chester Cone and my property is in Kenai, Alaska, adjacent to the Kenai River.

The property consists of 160 acres that I homesteaded in 1958, and on which I have lived and improved upon until now.

In 1977, I started subdividing the land into different parcels for sale and for my own residential development. In the spring of 1977, I subdivided a 15-acre tract, and after approval by all local planning agencies, sold it to Mr. Miles Dean, and he started a recreational development beside the Kenai River.

At the same time, I drew up my plans for a rural residential development on 90 acres adjoining the parcel sold to Mr. Miles Dean.

In the spring of 1978, the Corps of Engineers, in a series of public meetings, announced their intent of determining the status of all lands along the Kenai River and made public a document called the Kenai River Review.

The corps informed the public that much of the land along the river had been classified as wetlands and that all property owners must have their land inspected before starting or continuing any development.

Mr. Dean and I both asked for an inspection, which was done during the summer of 1978, and soon after both of us were cited for filling and dredging on wetlands, even though neither of us had ever received a report of determination as promised by the corps.

We were both issued a cease-and-desist order and informed that we would be fined as much as $25,000 a day until the violations were taken care of by submitting a wetlands permit application.

Some months later, Mr. Dean was sent a determination report that classified his land as wetlands, but a full year later, I had never received a determination, even though I had been informed to stop all development.

Repeatedly, Col. George Robertson and other corps personnel told us and everyone else in the public meetings that we would not be deprived of the use of our land, but would only have to obtain a use permit. Relying on this, we both filed all the necessary forms and followed through with all requirements.

After about 1½ years, I finally received notice that my land was wetlands. And an apology from the colonel that it had taken so long.

Something like a year after filing the application, Mr. Dean received a denial for use and he immediately stopped making payments and turned the entire property back to me for a loss of some $300,000.

My denial came 2½ years after filing and as a result of both denials I am left with 155 acres of land that I cannot use or sell.

Please remember that all of this land has been surveyed, logged for water depth, approved by all local planning and zoning agencies, engineered for designing, and in spite of all this, was turned down by each and every agency that reviewed the application.

Practically none of the protesting agencies had ever seen or set foot on the land. All of their letters of denial were almost exact copies of the first denial that came from a person from the Alaska Department of Fish and Game, who informed me that as far as he was concerned, there would never be any development along the Kenai River.

After 4 years of frustration and loss of my life's savings, I am resubmitting the parcels, one by one, and hoping for a little sanity in the process this time around.

The first resubmittal has been in the mill for 80 days and has reached the public review stage. Where it will go from now, is anybody's guess, but I hope for the best.

In conclusion, I would state that the permit process can never work under existing rules and regulations and must be drastically modified.

I would like to make the following recommendations for change to a more workable process: first of all, there must be a consensus of opinion from all agencies as to what constitutes a wetland, and all concerned must abide by one set of rules. Second, the timeframe for review must be adhered to strictly, and no agency should be allowed to extend or delay the application. A determination should be made as to who will have final jurisdiction, and in no instance should any one agency have veto power over the final review agency, which is now the corps. Whoever is the final compliance or regulation agency, must unilaterally apply the ruling to everyone equally, and not single out a few for scapegoats and ignore hundreds of so-called violators.

Finally, should the administrative agency determine that privately owned property is more important to the Government as a preserve or whatever, then the Government should be prepared to buy the land at fair market price and recompense the owner for all the loss of time and the funds expended to the time of condemnation.

Thank you all, you who have listened to these comments. And I hope that these hearings will result in some long needed revisions to a unwieldy process. Thank you.

Senator **MURKOWSKI**. Thank you, Mr. Cone. Mr. Dye.

STATEMENT OF JAMES BYE

Mr. **DYE**. Thank you, Senator. Thanks for the opportunity to testify before the committee. But I must admit pessimism on my part regarding the effectiveness of public hearings.

When the wetlands issue began to rage in Alaska, Dr. Max Brewer, who was the Commissioner of the State Department of Environmental Conservation spoke to the Resource Development Council one evening. Dr. Brewer expressed his reservations with the public hearing process and said that 90 percent of the witnesses were generally from Government agencies and 10 percent from the private sector. The 10 percent private sector were generally weighted 3 to 1 environmentalists, versus industry and the general public.

I think we've got a little better mix today, but we're still running true to form. But it's the only show in town and I'm here as one of those endangered species, known as we the people.

Your June bulletin, Senator, said this hearing was to receive testimony on Government protection of wetland areas as mandated under section 404 of the Clean Water Act. The mandate, if there is to be one, is not in the law, as passed by Congress in 1899 Rivers and Harbors Act or the congressional amendments in 1972 and 1977. I think the mandate is here primarily as a culmination of executive order and actions of agencies that have expended their jurisdiction through promulgation of their own rules and regulations.

Then we can compound this a little bit with the current trend of legislation, through case law, and we do indeed have a mandate. But let's not assume that Congress mandated it. The geographic extent of areas now classified as navigable waters of the United States and the types of activities now deemed to constitute discharges would astound the most liberal Congressman.

Congress should write the laws—not the judicial, nor the executive branches of Government.

There is no doubt at all the Congress sees it in the public interest to protect our wetlands, and I think they are reading the public mood rightly. You've made that same commitment in your bulletin and other statements, Senator. But I won't be satisfied with just a bootstrapped appendage to the water quality statutes to protect sensitive wetlands.

Here are my suggestions for improving the situation—I might just add that because of so much comment here on the definition of it, I'd like to say two things, that Colonel Nunn was very actively in the past couple of years involved in it. On two public occasions that I happen to recall, said at one time—and been a little facetious, I'm sure it was—but he said, if you got into the situation about wearing hipboots, you're definitely on wetlands. And on another occasion, he said that the potholes and the flatlands of the Dakotas that ducks would use moving from one State to another, would definitely be considered as wetlands—or could be, I should say—not definitely. So I say that somewhere between those two parameters might be a definition that we could all live by.

Anyway, identify—my suggestion is—identify the wetlands that are sufficiently valuable to warrant protection. Those that are significant, those that are critical. The aquatic ecosystems. Most tundra and all noncritical areas should be removed from wetlands classification. All private lands should be removed from wetland classification unless absolutely critical as aquatic ecosystems. Remember that less than 1 percent of all privately owned land—I mean land in the State of Alaska is privately owned.

Utilize our nationwide and the general permits that the corps has been using wherever possible. In addition to that, grant all cities districtwide general permits.

Second, I'd like to suggest that the corps should be established as the only agency with full and final permiting authority. I think they're more capable of carrying that out in the interest of public concern. They should be prohibited though, from allowing veto powers as the EPA now maintains. Restrict the use of the memorandum agreements or other arrangements that might encourage agencies to jeopardize the rights of permit applicants. By jeopardizing I mean the mitigation that's often required in order to gain consent of the—all agencies involved. Those mitigations often end up with stipulations that are many times unjustified and awful expensive.

Permit the corps to continue public interest reviews, but define the method and the extent of those reviews. Agencies should still pursue—or still, at least, have the right through judicial recourse, if it's in the public interest.

The bundle of rights of the private landownership is being erroded, and I think, as a Congressman, it should be noted and try to protect it, if at all possible. So, because of that, I say that we ought to devise some means for prohibiting any Government agency from taking land without just compensation. When a taking by inverse condemnation or a regulatory taking wherein the land use is severely restricted and values are altered, the just compensation clause of the U.S. Constitution demands that the public pay for its needs.

Mr. Eames, an attorney for the National Wildlife Federation evidenced strong support the status quo of section 404 as presently administered in a June 18, 1980, Anchorage Daily News article. He reaffirmed that this morning in testimony before this committee. He did not, though, reconfirm what was in that article wherein he stated that the estimated value of each acre of wetland ranged from $50,000 to $80,000. I don't know where he's arrived from that, but I think that would be a good starting point.

If the public interest demands preservation of wetlands, then justice demands payment for the taking of privately owned properties. The individual should not have to bear an unreasonable share of the cost of public interest concerns.

This payment can be in the form of a cash settlement, or it could be an arrangement of whereby the property owner would retain title under a restricted use agreement in exchange for other considerations such as, one, payments, or tax credits, or like our oil and gas development or coal development programs or intangible development costs that might be used on other property—transferred to other property, or sold to other individuals and used.

There is no greater incentive—I'll close with this remark—there's no greater incentive to be reasonable in regulatory decision than when we have to be accountable for the results of them. Thank you.

Senator MURKOWSKI. Thank you, Mr. Dye. Ms. Ruiz.

STATEMENT OF DARLENE RUIZ, PACIFIC LEGAL FOUNDATION

Ms. RUIZ. Good afternoon. Thank you for allowing me to appear here today on behalf of the Resource Development Council. My name is Darlene Ruiz, and I am an attorney employed by Pacific Legal Foundation appearing before you on behalf of our liaison office for Resource Development Council.

Pacific Legal Foundation is a nonprofit, tax exempt, public interest organization with members, contributors, and supporters, located throughout the country, and with our legal offices located in Sacramento and Washington, D.C.

PLF advocates a broad view of the public interests and seeks to assure a balance and common sense are the basis on which laws and regulations are established, interpreted and administered. It is precisely this concern for a rational, balanced, and commonsense approach, to the establishment, interpretation, and application of laws and regulations which have caused PLF to actively participate in a presidential task force on Regulatory Relief amending regulation—seeking to amend regulatory provisions of the Clean Water Act.

The number of State and Federal agencies testifying here today is evidence of the overlapping as well as competing interests of administrative agencies seeking to tie down or obtain jurisdiction over wetlands without any congressional definition of wetlands. And without the benefit of expressed goals and objectives in wetlands preservation or protection.

The earlier testimony of one of the witnesses here this afternoon that wetland jurisdiction is a hodgepodge of regulation is indeed accurate. The regulation of wetlands has grown like a hybrid, far removed from the seed of legislative intent that sought to protect the navigable waters of this country. Instead of seeking to improve the quality of navigable waters, agencies have raced to increase their jurisdictions through expansion of the definition of wetlands with little concern for the effects upon regions or the impact upon individual freedoms and property rights of citizens. Where definition has failed to serve the purpose of agency encroachments, the mire of procedural manipulations has worked to the benefit of the agency without regard for the detriment to property owners.

This mire of regulations I have set forth in my paper presented to this committee. And I will not go into the list included there. The agencies involved in interpreting, regulating and commenting upon the applicants proposed project include those listed there, the EPA and the Army Corps of Engineers, as well as numerous State and local agencies, also listed within my paper.

This proliferation has resulted in inequities, confusion, and frustration just expressed in testimony by the preceding witnesses.

Jurisdiction must be centralized in one agency. Competing interests of agencies fearful of lost jurisdiction must be put aside, and regulation over dredging and filling in navigable waters should be fully centralized in the Army Corps of Engineers.

Regulations promulgated by the corps should be accomplished through statements of goals and objectives governing wetlands without reference to the jurisdiction held by existing agencies. Such a statement of goals and objectives may then be used as a concrete standard by which significant wetlands could be identified. The current vagaries and ambiguities surrounding the definition of wetlands may represent full employment for consultants and attorneys, but the cost to be borne by the individual property owner is staggering.

The importance of identifying and regulating only significant wetlands would serve more than the purpose of clarity. It would provide citizens with due process. Notices to be given to all interested persons that significant wetlands were to be identified. The opportunity to be heard and to present competing evidence and testimony would provide some recognition of the rights ignored under current regulation. Further, the opportunity for regional and local input into the determination would provide balancing data for the corps to weigh in determining significance of wetlands.

Section 404 is not a wetland preservation statute. The fact is, that section 404 is intended to control the discharge of dredging or fill material and is not a wetland preservation statute. Its sole purpose was to control discharge of two types of pollutants into the Nation's waters. Regulation and case law has expanded the corps' authority to regulate the deposit of dredged or fill material into a variety of wetlands. The only reference in Federal legislation is one—an oblique one, to wetlands dredge and fill activities found in the 1977 amendments. But it is nowhere defined.

The corps' section 404 permit program attempts to expand the original purpose of the act by purporting to protect wetlands while using the permit process to regulate land use. The ultimate effect of the vague protectionist approach to wetlands has resulted in governmental taking of private property, not anticipated when the Clean Water Act was enacted. The enormity of the taking has been made all the more dramatic by the vast geographic areas currently regulated by the corps within Alaska.

Permitting procedures must be focused on benefit/burden to the property owner. The wetlands review by the corps starts with the presumption that, quote, wetlands are vital areas that constitute productive and valuable public resource, the unnecessary alteration and destruction of which should be discouraged if contrary to the public interest. The burden of overcoming the presumption is on the property owner, who can overcome the presumption only if clearly demonstrated otherwise. And some of the earlier testimony here today suggests that in order to do so, one must approach a development project in a wetlands—botanists and probably a public relations expert to coordinate the various agencies.

The presumption in favor of the importance of wetlands must be eliminated with greater emphasis being given to property rights of the individual. The applicant must be permitted an opportunity to fully challenge the conclusions of the objecting agency. There must be some provision for awarding the costs if an agency is found to have objected to a project without adequate foundation or documentation of its conclusions. Some of the witnesses here today and in their supporting exhibits to their testimony, have been informed that an agency simply said there were concerns that it would impact wildlife in the area. They have no access at that point—they have not been able to address what that is based upon, and yet that is taken to be a grounds for not being—a project not being in the public interest.

Mere assertions that project might endanger ecosystems would be deemed insufficient.

The recent amendments made by the Army Corps of Engineers that are soon to be implemented, I hope, are akin to a cool breeze on a hot afternoon, but cannot and should not be characterized as the final solution to the regulatory mire described by witnesses today. Further, efforts to define and streamline the section 404 permit process are necessary to produce the kind of balanced approach to wetland regulation that was expected by Congress. The first positive steps toward balancing of human concerns versus wetland concerns have been taken and must continue. The future development of Alaska depends on it.

Thank you.

Senator MURKOWSKI. Thank you very much, Ms. Ruiz. First of all, I should comment that this is easily made concerning a couple of other people that wanted to be here but felt less than comfortable because they had pending applications. I want to assure you, and I'm speaking on behalf of those involved including Colonel Saling, that if there is such a situation existing where there is any indication that there is any type of harassment to anybody that has applications pending before any governmental agency, it would of course, be appropriate to bring that to the attention of the colonel, and/or myself, if that is appropriate in your own mind. And it would be appropriate, I assume, if you didn't get satisfaction from the Corps of Engineers and the existing officer in charge, Colonel Saling. Colonel, I assume that you're in complete agreement with that?

Colonel SALING. Yes, sir.

Senator MURKOWSKI. I just want to make sure the record is correct. We welcome your testimony, Ms. Easley, we welcome the testimony of Mr. Benson, and Mr. Cone. I think it represents what we attempted to gather for the record; namely, how is it working for the individual Alaskan who must rely upon his own ingenuity and does not have the backup of perhaps an oil company with a group of land specialists and attorneys to call on, but must submit through the rather extensive regulatory process pretty much on the ingenuity and merits of his own individual application.

I would like to ask, Mr. Benson, why was your permit turned down?

Mr. BENSON. As of right now, I'm not sure if it has been or not.

Senator MURKOWSKI. I see.

Mr. **Benson**. I was told by the Corps of Engineers, that my permit had no chance of going through because the Fish and Wildlife Service has protested it.

Senator **Murkowski**. Did the Fish and Wildlife Service tell you why they protested it?

Mr. **Benson**. They sent out a form letter which showed every animal and every fish in the State of Alaska on our piece of property, which I don't think is possible.

Senator **Murkowski**. This is in a proposed airfield? How far up on the highway?

Mr. **Benson**. It's right on the main highway, and it's mile 33 from Anchorage.

Senator **Murkowski**. Well, I would suggest that we make an effort to get you together with the U.S. Fish and Wildlife Service and see if we can't get a little more definitive reason. Logic would seem to dictate that if a highway goes by it, the birds and the bees are accessible to the wayward activities that are associated with a highway. I assume it's a small airfield.

Mr. **Benson**. That's true. We also offered mitigation and were denied completedly. They wouldn't even talk to us about any mitigation at all.

Senator **Murkowski**. Well, I really don't think this is an appropriate hearing to get into the pros and cons of mitigation. I can certainly understand, as testimony given by Mr. Dye and other persons that in effect you're required to pay taxes, yet your property as you perceive it as private property, free for whatever usable use, is not contrary in the public interest, and suddenly the value of that property has been eliminated from you as an individual and yet no local body has deliberated on the pros and cons of whether to release you of any tax liability. I would assume that this would become more and more a major issue within our own State legislature.

I don't know, Ernie, do you know of any cases in Juneau where they are discussing this or does the State take the position that it's a Federal problem?

Mr. **Mueller**. Well, local property taxation rules are set by local governments by and large under the constitution, which would apply that assessment would be essentially full assessment. But I think there's an interesting constitutional argument whether the actual value of the property is substantially diminished by the fact that you can't use it for certain purposes. But I think that the Kenai Borough has zeroed out some assessments as a result of some people being prohibited from certain uses of their property.

Senator **Murkowski**. And strip mining, I believe that the landowner must operate within the Federal law even on private land, the Endangered Species Act, if there are any animals on private land, te owner can't—I don't believe—jeopardize the particular species. Billboards, the owners can't put up billboards on private land along a Federal highway. My point is, it's a very, very gray area as to what the precedent is with the Government land or the use of land and providing compensation for it. But I certainly agree that there should be consideration given if you have purchased the land in good faith, and attempt to do some lawful purpose with it, and suddenly you are eliminated by a decision made by a Government agency for utilizing it for that purpose, and it appears to have no other alternative purpose which would give you an opportunity to maintain your value.

Mr. Cone, why was your permit turned down? On the Kenai River there's a lot of property on the Kenai River?

Mr. CONE. The final agency that made the last decision against it was the EPA for—what do you call it—for certificate of class or something. That was the one that the corps said was the vital one that caused them to say, "No," to the permit.

Senator MURKOWSKI. Why did they say, "No"?

Mr. CONE. Because this one agency had said that it was against public interest. And all the time I was thinking, according to public address by members of the corps that they had the final jurisdiction, but later Col. George Robinson told me that if any one agency protested that that would overrule them. So, this is one of my bones of contention, who has the final decision.

Senator MURKOWSKI. Well, I think we've heard today in the testimony given that the corps, unless it's an extremely unusual case, and then the Federal EPA has the final say upon an appeal. It may be true in your case that the Alaska Department of Fish and Game may have objected, and I don't know the course of events. I assume would be to come through your agency with a recommendation that the permit not be given, and then you, Ernie Mueller, would respond to the Corps of Engineers. Is that how it works if it comes from the State department of fish and game?

Mr. MUELLER. I have a feeling that it worked differently then than it works now. As far as the fish and game, at that point in time, directly commented to the Corps of Engineers on permits.

Senator MURKOWSKI. They commented directly with the corps?

Mr. MUELLER. Yes.

Senator MURKOWSKI. Well, I would like to see at least an explanation to the point of determination for you people, the basis of the decline from whatever agency signing the letter declining your application or in your case, Mr. Benson, I gather it's still open. I would again respectfully prevail upon Colonel Saling to assign one of his people to at least review the status and go over the explanation to see if the communications are such as has been transmitted to us at this hearing today, recognizing that it's a matter of what's in the public interest. I would appreciate, colonel, having a report, because we do have a representative group here of individuals who have taken the time to come before us and make their concerns known. That's what we've asked for in this hearing was to get that type of input. I think, Mr. Dye, your concern about the Government taking over, private property, in effect, by changing its classification is one that I certainly concur that there should be consideration given if at the court of last resorts there is no further question that the property is going to be lost for what you consider was a reasonable use and in the public interest.

Again, I appreciate the collective and individual testimony that's been given here. And I want to thank you all. I would ask, too, that if you have any further people in your organization that want to submit written testimony for the next 2 weeks, we would certainly accept it with thanks for the record. And thank you.

Ms. SEALEY. Thank you, Senator.

Senator MURKOWSKI. Is that within your concurrence, colonel?

Colonel SALING. Yes, sir. I can give you an answer on Mr. Cone right now. But I'll give it to you officially.

Senator MURKOWSKI. All right. Our last witnesses and we're going to conclude this quite soon, are three. We're going to call up Angie Dugick, Quadrant Development Corp., and David Wigglesworth, Northern Alaska Environmental Center, and Mr. Michael Sotag, Northwest Gas. And that is the official conclusion of the witness list that the Chair has at this time.

Let's try ladies first. That usually works.

STATEMENT OF ANGIE DUGICK, DEVELOPMENT MANAGER, QUADRANT DEVELOPMENT CO.

Ms. DUGICK. Good afternoon, my name is Angie Dugick, and I am the development manager for Quadrant Development Co. We are a local land development firm and currently have about 2,000 acres in various stages of development in the Anchorage bowl.

Having been involved in the real estate development process in Anchorage for the past 7 years and in the wetlands process for the past year and a half, I wanted to share some of our experiences and insights with you today.

Senator MURKOWSKI. Can I ask you to kind of summarize your statement rather than read it all?

Ms. DUGICK. Sure. We have received six wetlands permits and we have several more in the process of the corps' review. And I want to just say that I guess we're not one of the parties who felt that coming here was going to hurt our application.

We have been very, very involved with the municipality in its planning effort on the wetlands management plan. And there was some discussion of compensation earlier and some questions. And to be candid, one of the reasons we were actively interested in the wetlands plan, is the municipality has developed a mechanism for compensation for lands put in a preservation wetlands category. I don't know if that was adequately discussed earlier in the testimony today.

Senator MURKOWSKI. No; it was not.

Ms. DUGICK. It's been a concern to us having thousands or hundreds of acres that we thought were developable, that, you know, we make our living developing lands, and that was being taken away. And the city, in its wetlands plan, has proposed that when lands were put in that preservation category, they would be acquired by the municipality. In the process of adopting that plan, the Anchorage Assembly was made very aware that they were making a financial commitment to acquire those lands by cash or through the process of exchange for other municipally owned properties here.

Senator MURKOWSKI. Were funds authorized for the purchase?

Ms. DUGICK. Not at that time. They weren't directly appropriated. But before they decided, they wanted to know exactly how much this was going to cost them. And there are some accounts made off the tax records.

Senator MURKOWSKI. Have they purchased any land?

Ms. DUGICK. Not yet. The plan was just approved about 2 months ago. And the general permit has not yet been approved.

We are very supportive of the general permit process. I can see where other than State it might present problems. But I'm hoping that where there are going to be problems, you're going to find solutions to remove the constraints that exist on that general permit process. Because we think it's been a tremendous effort. It has brought together really diverse parties. The environmental community, the agencies, the city people, and the developers have had to work together, have had to understand each other's point of view. That whole process has helped us to develop working relationships that we're going to need in the future. We are very happy with the system in Anchorage.

I should point out that the general permit that's being applied for is not going to address all of the wetlands in Anchorage. Those give us some concern. There are some areas that are still identified as critical that were left out of the general permit. And there's real small areas that don't appear.

I should point out that Alaska has over 362,000,000 acres of land, that Anchorage only has about 600,000 of those acres. That's about 2.2 percent. Most of the land in Alaska, I'm sure you're aware, is not in private hands. It's owned by State, Federal, and native corporations. Anchorage is particularly unique in that most of the developable land was easy stuff. You know, and that's been developed. And development here is in a real small area. And most of that is marginal land and that's the land that's been called wetlands. And we are seeing that the permit process is pushing up our costs. Housing in this town—and in all of Alaska—is already horribly expensive. Mr. Dye or someone else mentioned $50,000 to $80,000 an acre. We're seeing undeveloped land in Anchorage going for $35,000 an acre. If it's zoned for multi-family, a couple hundred thousand. A single family lot in a subdivision, detached home, 6,000 to 10,000 square feet, we're looking at midforties, to buy that land. In our experience, we've got some horror stories. I think you've heard enough today. I'm not going to bore you with ours. But those costs get passed on to the ultimate buyer. In Anchorage, so much of the land is what you would call technically wetlands. That's only going to hurt people up here. I don't think it was the intent of the legislation to price people out of housing.

One of the problems is this definitional question. And you've heard a lot about it. We have had experiences where we have been building in a certain part of Anchorage for a long, long time and suddenly it's just classified a wetland. These technical grey areas are a real problem to us. I'd like to see some uniformity because I don't think all wetlands are critical.

One of the real problems for us is the short construction season, and the timeframes with the Corps of Engineers, not through lack of good will, but through the coordination process that is required. Practically, we develop our lands as we see a market for it. And sometimes there's a very short time frame. If we cannot get a decision in April or May, then we have lost an entire construction season. And by that time, if you can't get in the ground, then you've missed your entire market. The costs of missing the market really hurts us. Any way to expedite the process would be appreciated.

The final concern, and I think people have sort of addressed it and talked about it, is this grey area where there are individuals with an agency who come from all walks of life, all perspectives, all backgrounds. They have to make basically, what comes down to just a plain old judgment call. They've just got to say yes or no, one way or the other. We see property owners falling victim to the bureaucracy when that kind of a judgment call goes against them. Those owners don't have the kind of resources that my company does or the oil companies to go through the process. We've never been to an appeal, but that would just be a terrible thing to happen to us also on a financial basis. I'd like to see somehow that this be recognized, that when a judgment call goes against an individual, and it's later overturned whether you made a mistake or whatever, that there be some compensation given to that individual for that error, through the delay and the cost of that delay, the cost of going through the appeal process. I think there should be some mechanism that would encourage the regulators and people involved to maybe lean toward the private property owner. If that had been an individual who bought that land and paid a lot of money for it, there should be some recognition. I think you're all on the right track with that.

In summary, I think the wetlands process in Anchorage is working very well for the most part, and we support the process here. If there is anything you can do in some of these problems that have been pointed out by all the testimony today, it would be very, very helpful to the little guy who couldn't be here today. We're all kind of speaking on behalf of the guy at the gas pump, and the guy who buys the condo, and whomever. So thank you very much. And thanks for coming here and giving us a chance to testify where we ordinarily wouldn't have had the chance.

Senator MURKOWSKI. Thank you very much, Ms. Dugick. I think you've objectively covered a broad area of concern where as you say, the little people out there and their sometimes inability to surmount some of the obstacles on the duplication that we seem to establish over a period of time based on expanded court decisions and so forth.

Who is next, Mike, David?

STATEMENT OF MICHAEL SOTAG

Mr. SOTAG. I'll try to keep this very brief. I had not planned on making a presentation, so therefore, I do not have a prepared statement. Mr. Chairman, my name is Michael Sotag. I am employed by Northwest Alaska Pipeline Co., and as a vice president for environmental affairs. Our company does consider the environment to be extremely important, and has made an effort or an attempt to do as much as possible to minimize or to potentially minimize the impact which we will create with the pipeline construction.

Let me state first that Northwest Alaska applauds basically the efforts of the Corps of Engineers and their sincerity in working very diligently, within the present framework of the current regulations with us. We do not as of yet have a permit, because we do not necessarily agree at this point with all the conditions and stipulations that have been attached to the permit. But will continue and are confident that we will work out permit conditions and stipulations that will be acceptable to us and acceptable to the Office of the Federal Inspector. Their cooperative attitude will lead us to a satisfactory outcome.

However, to make our future negotiations more fruitful, I would like to express Northwest Alaska's support for the American Petroleum Institute's recommendations for the revision of section 404, the Clean Water Act, and section 10 River and Harbor Act Regulations sent to Vice President Bush in February of this year. The API proposed a revised section 404 regulating program with 13 major features which would significantly simplify and streamline the permitting process and yet protect the environment.

Yesterday, Northwest Alaska responded to a request from Deputy Administrator Tozzi, who requested information concerning our involvement regarding Federal Water Pollution Control Act section 404. This response transmits our background position paper on our relationships with the U.S. Army Corps of Engineers concerning the section 404 permits. I will enter this paper into the record. (See p. 335.)

One piece of information that I cannot attach today is a letter from Amos Matthews to Northwest where he reviewed our position paper prior to submitting it to Mr. Tozzi. We will send that to your office prior to the close of this record.

Senator MURKOWSKI. Thank you, Mike.

Mr. SOTAG. Our major objections are basically two: first, agency officials use the laws and regulations in a restrictive manner that does not appear to represent the intent of Congress. And second, that the section 404 permitting process affords agency officials a readily available and virtually open-ended opportunity to impose discretionary terms and conditions that may be of interest to those agencies, but not necessarily those of the corps. We will fully intend to conduct further discussions with the corps on a cooperative basis. And possibly, would like to use the nationwide permits to greater applicability for our project. Thank you very much for this opportunity to show up uninvited.

Senator MURKOWSKI. Well, you're always invited, Mike, and we appreciate your testimony. Thank you.

Mr. David Wigglesworth for the Northern Alaskan Environmental Center.

STATEMENT OF DAVID WIGGLESWORTH

Mr. WIGGLESWORTH. My name is David Wigglesworth. And I am a researcher for the Alaska Center for the Environment here in Anchorage. And I have been asked by the Northern Alaska Environmental Center to give their testimony.

Before I give this testimony, I would like to submit for written record a testimony by the Alaska Center for the Environment. And if that could be placed on the record. (See p. 351.)

Senator MURKOWSKI. So noted for the record.

If you could summarize your testimony, I would appreciate it.

Mr. WIGGLESWORTH. I'll try to be brief. A lot of the stuff that's in this testimony here now has been previously stated.

The Northern Alaska Environmental Center appreciates the opportunity to testify before Senator Murkowski and this committee. We have watchdogged the Corps of Engineers permitting program on the North Slope of Alaska, since the value of the wetlands have been recognized. The basic point that this testimony is stressing is that they were particularly—and I quote—we were particularly concerned by the recent remarks published and published statements of Alaska Senator Murkowski concerning the relationship between the definition between wetlands and permafrost. On some other occasions, he has questioned the inclusion of soils and vegetation kept perennially inundated or saturated by an impermeable frozen layer in the very definition of wetlands under section 404. We wish to testify today on the biological values of the vast North Slope wetlands that are maintained by permafrost, and we want to consider—and what we consider to be the reasonable approach being taken by the resource agencies to mitigate the impacts of oil and gas exploration and development.

The issues of delay and permit denial are separate ones that are best handled administratively. But let us not throw out the baby before the bath water and advocate protection of national international fish and wildlife resources.

In summary of the next few pages here, the testimony goes into discussing the fact that there is going to be anticipated growth of oil and gas development on the North Slope. This, in turn, creates more of a need for transportation systems and pipelines. And they are particularly concerned about the expanding development in the Kapurek field. They've—and I quote—we feel that it is clear that the North Slope wetlands meet the original intent of the congressional protection in that they are an important national and international resource. In stating this, they go on to document that the North Slope area that they are concerned about harbors 72 migratory bird species, 25 of which breed there, including a variety of types, Whistler swans, brandts, et cetera. They go on to further state that a beyond study done, showed that similar use of wetland habitat types on coastal plain with historical densities of breeding birds ranging from 2.3 to 5.4 million. Further studies suggest that—you know—during—since some periods of drought in Canada and northern and central United States, large-scale displacements swells these numbers in the areas that we're talking about in Alaska.

They also suggest that there are three major caribou herds that are present in these areas, as well as 18 other mammal species. And I quote, the productivity of the wetlands and their critical nature for some wildlife species has been well documented. The issue before us is whether the corps permitting program has functioned to protect the wetlands values without undue costs and delay to those seeking to develop the wetlands. We believe that the program has evolved over the past 5 years, and is continuing to approach this goal. The many studies that were carried out, were all directed at a practical goal of impact mitigation. However, the permitting agencies have been hampered by a lack of information on comprehensive plans for future developments. Because the information is often held fiercely proprietory, each development and permit action must be looked at individually and each new development takes an extra, unnecessary toll on wetlands.

Still, in all, progress has been made in general permitting activities with similar impacts. For example, placement of a small gravel pad within Prudhoe Bay. Due to the planning that occurred on the proposed natural gas pipeline, resource agencies coordinated a general permitting plan for lesser value wetlands areas. Over 800 miles of gravel, work pad, and associated access roads, well in advance of the proposed construction date. The developers could also increase the efficiency of the balancing act through planning and coordination.

Once general plans exist, individual permit actions and the engineering leeway for changes that with mitigating acts could be resolved more quickly.

The conflicts between development in wetland and resources will continue to exist. Even if the congressional body decides that redefinition is in order. A gravel pad that displaces a pond or a marsh eliminates the carrying capacity of a number of ducks or plovers that would ever be produced. The interlacing network of roads, buildings and 2-foot-high feeder-oil pipelines in the middle of a caribou calving grounds reduces the potential productivity of the herd, and ultimately the allowable harvest for subsistence or sport uses. The number of acres of wetland that must be lost if the oil and gas development does occur, and specifically, the impacts to wetlands of highest value can be reduced through careful siting, and planned, orderly development. It is a national government's responsibility to insure that the development is not directed solely toward the rapid pace and maximum profits at the expense of all other public resources.

In conclusion, we urge that this committee look carefully at administrative improvements in the program. The intent of the process is basically a sound one. And the relationship of the permitting agencies and those seeking permits is involving and increasing in efficiency during a period when enormous demand for the development is accompanied with a minimal Federal effort to increase the knowledge about Arctic resources and impacts.

We are unable to address the deletion of wetlands underlaying by permafrost from the definition because of the inserting of this proposition. It is immediately obvious to anyone who tries to walk in the North Slope without hipboots. The North Slope is indeed, de facto wetlands in terms of vegetation, soils, and productivity for water related birds and mammals that prey upon them. We urge you to take no steps that jeopardize these resources. Thank you.

Senator MURKOWSKI. Thank you, Mr. Wigglesworth. We appreciate your testimony and your concern.

I noted a reference to remarks and public statements by me concerning the relationship between definition of wetlands and permafrost. In further references on several occasions, I have questioned the inclusion of soil, vegetation, and where that source is from?

Mr. WIGGLESWORTH. To tell you the truth, I received this yesterday, and I received it as is. I'm just stating what they had given to me.

Senator MURKOWSKI. Who is they?

Mr. WIGGLESWORTH. The Northern Alaska Environmental Center.

Senator MURKOWSKI. I would appreciate a reference to that source.

Mr. WIGGLESWORTH. OK.

Senator MURKOWSKI. You can submit it for the record or submit it to my office directly. Because, for the record, I have made no such statement. I keep my statements much more simple than this one.

Mr. WIGGLESWORTH. It seems I'm involved——

Senator MURKOWSKI. I think this questions the inclusion of soils, vegetation, kept perannually. I haven't used that word for a long time—unindated or saturated by an impeccable frozen soil layer and the very definition—I haven't used that statement at all.

I think that the point that has been made at this hearing and a point that's been made throughout Alaska, to me, and was outlined as one of the highlights of this hearing is this problem with the definition. I think it's a problem that's not peculiar to Alaska, nor is it peculiar to an environmental group or a development group or just the citizens of Alaska. We do have a problem with the definition. As I think was eloquently expressed by Sig Restad, who probably knows more about Alaska and the lands of Alaska than any one of us put together, is the reality of it is changing. It can go from one type and classification to another, just by the natural process.

It's 4 o'clock. And we've gone on longer than I thought. But, I think the testimony that was given here has been expressive of the concerns for Alaska, concerns for the people that have to work within the permit system, work with the State Department of Environmental Conservation. I want to commend, certainly, Ernie Mueller, who has put in a yeoman's task, and Glenn Akins, at least as far as listening to the testimony. And I'm sure you will agree, gentlemen, that it's been extremely worthwhile.

I would like to commend, too, Col. Neil Saling, who has been in Alaska a very, very short time. In his capacity as district engineer with the U.S. Corps of Engineers. It's probably a good way to get started. You're hearing a lot of testimony that was brought about by things that your predecessors either did or didn't do. On behalf of the professional staff that's with us and has an opportunity to view Alaska, I'm sure you would agree it's a little different being here than reading about it or listening to somebody testify about it. It really is bigger than Texas. You can go back and tell those Texans that you really saw the promised land.

For those of you who have put in nearly 8 hours out there and have made your own observations but did not have an opportunity to testify, I would urge that you submit in writing your comments, observations, or questions to various witnesses or Colonel Saling, or Commissioner Mueller, or myself. And we'll be responsive. Or you may write to my office direct or if you don't like the way I conducted the hearing, Ted Stevens or Don Young. Whatever is fair.

I think that we have, as a result of this hearing, a better understanding of wetlands, and its application in Alaska. We have had the expression of concern from those Alaskans who, I think, are involved in the very real process of working with us on it. That's the important thing in the consideration and deliberations that will take place as a result of this hearing and the testimony that is submitted. I think that we have drawn attention to the realization that Alaska, again, is unique and that some day when we have the figure, we'll tell you what the second biggest State is and what their percentage of wetlands are. But we know that it won't compare to 57 percent of the land mass.

With that, I would again thank all of you that were here today, and announce that the hearing on the wetlands section 404 is concluded.

[Whereupon the hearing was adjourned to reconvene at the call of the Chair.]

[Statements and other material submitted for the record follow:]

STATEMENT OF EBEN HOPSON, JR.
SPECIAL ASSISTANT TO NORTH SLOPE BOROUGH MAYOR
BEFORE THE
SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION
OF THE
SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE
JULY 7, 1982

GOOD MORNING, MR. CHAIRMAN. MY NAME IS EBEN HOPSON, JR. SPECIAL ASSISTANT TO THE NORTH SLOPE BOROUGH MAYOR, THE LOCAL GOVERNMENT FOR THE ENTIRE NORTH SLOPE OF ALASKA. I APPRECIATE THE OPPORTUNITY TO PRESENT THE VIEWS OF NATIVE AND OTHER RESIDENTS OF THE NORTH SLOPE BOROUGH ON THE FEDERAL GOVERNMENT'S POLICIES AND PROGRAMS FOR PROTECTION OF WETLANDS. THIS IS AN ISSUE THAT HAS BEEN - AND CONTINUES TO BE - OF GREAT IMPORTANCE TO OUR COUNTRY.

IT IS OUR UNDERSTANDING THAT THE PURPOSE OF THIS HEARING IS TO GATHER INFORMATION ON THE EFFECTS OF THE CORPS OF ENGINEER'S PROGRAM FOR ISSUING PERMITS FOR DREDGING AND FILLING ACTIVITIES IN WETLAND AREAS PURSUANT TO SECTION 404 OF THE CLEAN WATER ACT AS AMENDED. THIS COMMITTEE WILL CONSIDER THE IMPACT OF THE PERMIT PROGRAM ON THE VARIOUS ENTITIES CONCERNED WITH ITS IMPLEMENTION - FEDERAL DEPARTMENTS AND AGENCIES, THE STATE OF ALASKA, LOCAL COMMUNITIES, AND INDUSTRY AND OTHER COMMERCIAL DEVELOPERS. THE NORTH SLOPE OF ALASKA IS ONE OF THE AREAS MOST AFFECTED BY THE PROGRAM, BECAUSE OF ITS EXTENSIVE WETLAND AREAS AND BECAUSE OF EXISTING AND PROPOSED MAJOR OIL AND GAS DEVELOPMENT ACTIVITIES. THUS, WE BELIEVE THE NORTH SLOPE BOROUGH'S EXPERIENCE WITH THIS PROGRAM IS OF PARTICULAR RELEVANCE. I WOULD LIKE TO DISCUSS IN MY STATEMENT THE NORTH SLOPE BOROUGH'S INTEREST IN THE GOALS OF THE SECTION 404 PROGRAM, ITS EXPERIENCE WITH THE CORPS OF ENGINEERS AND STATE PROCEDURES TO DATE, AND THE AREAS OF GREATEST CONCERN TO THE BOROUGH REGARDING ANY ADMINISTRATIVE OR STATUTORY CHANGES IN THE PROGRAM.

WETLANDS IN THE NORTH SLOPE BOROUGH

THE NORTH SLOPE BOROUGH CONSISTS OF OVER 88,000 SQUARE MILES, ENCOMPASSING THE ENTIRE COASTAL PLAIN OF THE STATE OF ALASKA NORTH OF THE BROOKS RANGE. OF THAT AREA, ANYWHERE FROM ONE-FOURTH TO ONE-THIRD OF THE NORTH

SLOPE MAY FALL WITHIN THE CORPS OF ENGINEER'S DEFINITION OF WETLANDS AND BE SUBJECT TO THE SECTION 404 PROGRAM. MUCH OF THE NORTH SLOPE, WHEN NOT FROZEN, IS WET TUNDRA WITH LIMITED DRAINAGE DUE TO THE FLAT COASTAL PLAIN AND THE IMPERMEABLE PERMAFROST WHICH LIES JUST BELOW THE SURFACE YEAR ROUND. VIRTUALLY ALL OF THE CURRENT OIL AND GAS DEVELOPMENT ACTIVITY ON THE NORTH SLOPE TAKES PLACE IN WETLANDS. CONSTRUCTION LOCATIONS AND METHODS, INCLUDING THE EXTENSIVE USE OF GRAVEL PADS AND ROADS, MUST ACCOMMODATE THESE UNIQUE CONDITIONS TO AVOID HARMING OR DESTROYING SENSITIVE ENVIRONMENTAL AREAS.

THE WET TUNDRA AND OTHER WETLAND AREAS ALONG STREAMS AND RIVERS OF THE NORTH SLOPE SUPPORT EXTENSIVE WATERFOWL, WILDLIFE AND FISH POPULATIONS OF THE NORTH SLOPE. THE NORTH SLOPE IS AN EXTENSIVE NESTING, BREEDING, AND SUMMER HABITAT FOR HUNDREDS OF THOUSANDS OF MIGRATORY BIRDS FROM THE LOWER-48 STATES. THESE WILDLIFE POPULATIONS ARE IMPORTANT TO THE CONTINUED SUBSISTENCE LIFESTYLE OF THE NATIVE COMMUNITY. FOR EXAMPLE, PLANTS GROWING IN WETLAND AREAS ARE UTILIZED AS A PRIME FOOD SOURCE BY CARIBOU, A MAJOR SUBSISTENCE SPECIES FOR OUR PEOPLE. THEY ALSO EMPHASIZE HOW THE WETLAND AREAS OF THE NORTH SLOPE ARE A MATTER OF NATIONAL CONCERN.

SOME WETLAND AREAS OF THE NORTH SLOPE ARE MORE CRITICAL THAN OTHERS, AND FUTURE DEVELOPMENT OF THE OIL AND GAS RESOURCES OF THE NORTH SLOPE IS NOT NECESSARILY INCONSISTENT WITH PROTECTION OF THESE HABITATS. BUT THE AREAS ARE FRAGILE AND CAN BE THREATENED BY ACTIVITIES WHICH ARE NOT WELL PLANNED OR ARE DEVELOPED WITHOUT APPROPRIATE PROTECTIVE MEASURES. IT SHOULD BE POINTED OUT, SENATOR, THAT ONCE THESE WETLAND AREAS ARE DESTROYED, THEY CANNOT BE REPLACED BY ANY CURRENTLY KNOWN REVEGETATION TECHNIQUES. THE NORTH SLOPE BOROUGH HAS CONSISTENTLY SUPPORTED DEVELOPMENT OF ITS ONSHORE ENERGY RESOURCES TO HELP SATISFY THE ENERGY NEEDS OF THE LOWER-48 STATES AS LONG AS THE DEVELOPMENT TAKES PLACE WITH NECESSARY CONCERN FOR, AND PROTECTION OF, OUR UNIQUE ENVIRONMENT AND WITH RESPECT FOR THE NATIVE SUBSISTENCE LIFESTYLE. FOR THESE REASONS, REASONABLE IMPLEMENTATION OF A PROGRAM SUCH AS THE SECTION 404 PERMIT PROGRAM IS A NECESSARY PROCEDURAL MECHANISM FOR THE CONTINUED PROTECTION OF OUR HOMELAND.

EXPERIENCE WITH THE SECTION 404 PROGRAM

OTHER WITNESSES AT THIS HEARING WITH MORE DIRECT DAY TO DAY EXPERIENCE WITH THE SECTION 404 PROGRAM CAN PROVIDE THE MOST HELPFUL SPECIFIC EXAMPLES OF THE PROBLEMS AND SUCCESSES OF THE PROGRAM. I WOULD LIKE TO REVIEW OUR EXPERIENCE IN MORE GENERAL TERMS. AS DISCUSSED ABOVE, THE NORTH SLOPE BOROUGH

STRONGLY BELIEVES THAT AN EFFECTIVE PROCEDURAL MECHANISM IS NEEDED TO INSURE PROPER REVIEW OF NEW DREDGING OR FILLING ACTIVITIES THAT COULD HAVE A SIGNIFICANT ADVERSE EFFECT ON CRITICAL WETLAND AREAS. THE EXISTENCE OF PROCEDURAL REVIEW OF PROPOSED PROJECTS DOES NOT REPRESENT OPPOSITION, AND IN THE VAST MAJORITY OF SITUATIONS APPROVAL IS GRANTED. WHERE PROBLEMS ARE IDENTIFIED, THEY GENERALLY CAN BE MITIGATED THROUGH REASONABLE MODIFICATIONS TO THE PROJECT THAT ARE COMPATIBLE WITH THE ULTIMATE COMPLETION.

AS A LOCAL ENTITY, THE NORTH SLOPE BOROUGH IS NOT GIVEN A SPECIFIC ROLE BY STATUTORY LANGUAGE OF SECTION 404 OF THE FEDERAL WATER POLLUTION CONTROL ACT IN THE REVIEW OF PERMITS OR THE DEVELOPMENT OF FEDERAL POLICIES. AS THE PRINCIPAL LOCAL UNIT OF GOVERNMENT, WITH SUBSTANTIAL POLICE AND ZONING POWERS, HOWEVER, THE BOROUGH HAS BEEN GIVEN AN OPPORTUNITY TO PRESENT ITS VIEWS AND RECOMMENDATIONS TO FEDERAL AGENCIES CHARGED WITH IMPLEMENTING THE PROGRAM. WHILE THERE HAVE BEEN SITUATIONS WHERE COMMUNICATION WAS UNSATISFACTORY OR INADEQUATE, THE NORTH SLOPE BOROUGH IS GENERALLY SATISFIED WITH THE LEVEL OF CONSULTATION AND INVOLVEMENT THAT CURRENTLY TAKES PLACE.

IT IS OUR VIEW THAT THE CORPS OF ENGINEERS HAS MADE A GOOD FAITH EFFORT TO USE THE SECTION 404 PERMIT PROGRAM AS A MECHANISM FOR BRINGING TOGETHER THE VARIOUS INTERESTED PARITES TO REVIEW SIGNIFICANT PROPOSED DEVELOPMENTAL ACTIVITIES. THE SECTION 404 PERMIT REVIEW PROVIDES AN EXCELLENT OPPORTUNITY FOR THE PARITES TO DISCUSS THE SCOPE OF AN PROJECT AND ITS POSSIBLE ADVERSE EFFECTS ON WETLAND AREAS AND TO REACH AGREEMENT ON CONSTRUCTION OR OPERATING CONDITIONS WHICH MAY BE NECESSARY TO AVOID ADVERSE EFFECTS. IT PROVIDES AN EFFECTIVE AND USEFUL VEHICLE FOR THE BOROUGH TO PRESENT ITS CONCERNS AND HAS, ON BALANCE, SERVED THAT PURPOSE REASONABLY WELL.

KEY ELEMENTS OF FUTURE SECTION 404 PROCEEDINGS

IDEALLY, REGULATION OF ACTIVITIES AFFECTING NORTH SLOPE WETLANDS SHOULD BE A FUNCTION OF THE STATE AND LOCAL GOVERNMENT. BECAUSE THERE REMAIN MANY UNCERTAINTIES REGARDING THE ULTIMATE ENVIRONMENTAL EFFECTS OF DEVELOPMENT ON WETLANDS, IT IS IMPORTANT TO HAVE AVAILABLE, FOR NOW, THE RESOURCES OF ALL GOVERNMENTAL UNITS, INCLUDING THE KNOWLEDGE AND EXPERIENCE OF FEDERAL AGENCIES AND DEPARTMENTS. UNTIL MANY OF THE REMAINING ISSUES HAVE BEEN RESOLVED, SUCH AS ULTIMATE CLASSIFICATION OF THE LANDS OF THE NORTH SLOPE, IS IS USEFUL TO HAVE CONTINUED FEDERAL REVIEW. THIS IS PARTICULARLY TRUE WHERE, AS IS CURRENTLY THE CASE, FEDERAL AGENCIES ARE ATTEMPTING TO ADMINISTER THEIR AUTHORITIES IN A MANNER DESIGNED TO MINIMIZE PROCEDURAL DELAYS AND SUBSTANTIVE CONFLICTS.

MOREOVER, AS I NOTED EARLIER, THE PROTECTION OF THE NORTH SLOPE'S WETLAND AREAS HAS NATIONAL SIGNIFICANCE DUE TO THE MIGRATORY NATURE OF THE WATERFOWL, MARINE, AND TERRESTIAL MAMMALS THAT RELY ON THOSE WETLANDS. THIS IS THE CASE WITH OTHER WETLAND AREAS OF ALASKA THAT SUPPORT SPORT AND COMMERCIAL FISHING AND OTHER NATURAL RESOURCES, WHICH ARE OF VALUE NOT JUST TO ALASKA'S RESIDENTS. FOR THESE REASONS, WE RECOMMEND THAT, AT LEAST FOR THE FORESEEABLE FUTURE, THE STATUTORY AUTHORITY FOR THE SECTION 404 PROGRAM BE RETAINED AND ANY ADJUSTMENTS DEEMED NECESSARY TO AVOID UNREASONABLE RESULTS BE ACCOMPLISHED THROUGH MODIFICATIONS TO THE PROCEDURES AND INTERPRETATIONS OF THE ADMINISTERING AGENCIES. WE BELIEVE THAT PROBLEMS CAN BE ELIMINATED WITHIN THE CURRENT STATUTORY PROGRAM AND THUS DO NOT SUPPORT ANY ARBITRARY ELIMINATION OF THE PROCEDURAL AND SUBSTANTIVE PROTECTIONS AFFORDED BY SECTION 404. WITH RESPECT TO POSSIBLE CHANGES IN THE PROGRAM, WE OFFER THE FOLLOWING GENERAL COMMENTS AND SUGGESTIONS.

IT IS ESSENTIAL THAT THERE BE EFFECTIVE PROCEDURAL MECHANISMS TO INSURE ADEQUATE REVIEW BY ALL AFFECTED PARTIES TAKES PLACE BEFORE DEVELOPMENTAL ACTIVITIES PROCEED. A MAJOR ATTRIBUTE OF THE SECTION 404 PROGRAM IS ITS EFFECTIVENESS IN BRINGING TOGETHER AT ONE TIME THE COMMENTS OF THE STATE AND THE NORTH SLOPE BOROUGH AS WELL AS THOSE OF THE FEDERAL GOVERNMENT, SO THE APPLICANT CAN ADDRESS THEM IN A SYSTEMATIC AND COORDINATED MANNER. SUCH PROCEDURES NEED NOT, HOWEVER, BE THE SAME FOR ALL ACTIVITIES, GIVEN THE DIFFERENCES WITHIN THE NORTH SLOPE. SOME AREAS ARE MORE CRITICAL IN TERMS OF HABITAT OR OTHER VALUES THAN OTHER AREAS. WITH PROPER PLANNING, SUCH AREAS CAN BE DESIGNATED, OR CRITERIA ESTABLISHED, TO INSURE THEY RECEIVE CLOSER SCRUTINY. PROCEDURES FOR AREAS OF LESS SENSITIVITY CAN BE STREAMLINED TO EXPEDITE PERMIT ISSUANCE. RATHER THAN ELIMINATE REVIEW THROUGH ARBITRARY DEFINITIONS AND CLASSIFICATIONS, THE PROCEDURAL AND SUBSTANTIVE CRITERIA CAN BE TAILORED TO REFLECT THE NATURE OF THE AREA AND THE TYPE OF ACTIVITY BEING PROPOSED.

PROCEDURAL MECHANISMS THAT INSURE SOME PROTECTION WITHOUT UNDUE PROCEDURAL BURDENS, SUCH AS GENERAL PERMITS, SHOULD BE UTILIZED TO MITIGATE SOME OF THE POTENTIAL PROCEDURAL DELAYS ASSOCIATED WITH THE SECTION 404 PROGRAM. GENERAL PERMITS CAN IMPOSE GENERALLY-APPLICABLE CONTROL MEASURES, IMPOSING NO SIGNIFICANT ADDITIONAL BURDEN ON APPLICANTS YET PROVIDING ADEQUATE PROTECTION FOR SENSITIVE AREAS.

THERE ALSO CONTINUES TO BE A NEED FOR A COMPREHENSIVE "MASTER PLAN" FOR

REVIEW OF DEVELOPMENT ON THE NORTH SLOPE. SUCH A PLAN WOULD PROVIDE INDUSTRY WITH ADVANCED GUIDANCE ON CRITICAL AREAS WHERE SPECIAL REVIEW WILL BE REQUIRED. EFFORTS TO CATEGORIZE THE NORTH SLOPE AS WETLANDS OR NON-WETLANDS, AS WELL AS IDENTIFY THE MOST CRITICAL AREAS, REMAIN UNCOMPLETED. THE NORTH SLOPE BOROUGH FOR SEVERAL YEARS HAS BEEN DEVELOPING A PLAN FOR PROTECTION OF ITS COASTAL PLAIN PURSUANT TO THE COASTAL ZONE MANAGEMENT ACT. THE BOROUGH HOPES TO COMPLETE A NEW DRAFT OF SUCH A PLAN IN THE RELATIVELY NEAR FUTURE, WHICH COULD PROVIDE A COMPREHENSIVE MANAGEMENT PROGRAM FOR DEVELOPMENT ON THE NORTH SLOPE. THIS PLAN WILL NOT PREVENT OR IMPEDE FURTHER DEVELOPMENT ON THE NORTH SLOPE BUT WILL INSURE A REASONED REVIEW AND REGULATION OF THE POTENTIAL IMPACTS OF THAT DEVELOPMENT. THE PROCESS FOR PUBLIC INVOLVEMENT AND STATE REVIEW OF THE NORTH SLOPE BOROUGH'S COASTAL MANAGEMENT PROGRAM WILL MAKE IT A PARTICULAR USEFUL AND WELL-DEVELOPED PROGRAM THAT SHOULD BE INCLUDED WITHIN THE FEDERAL ADMINISTRATION OF SECTION 404.

ROLE OF THE NORTH SLOPE BOROUGH

AS I HAVE ATTEMPTED TO MAKE CLEAR IN THESE COMMENTS, THE SUBSTANTIVE PROTECTIONS OF SECTION 404 - THE ABILITY TO LIMIT OR PROHIBIT DEVELOPMENT THAT MAY DESTROY OR HARM CRITICAL WETLAND AREAS - ARE IMPORTANT AND SHOULD NOT BE ELIMINATED. SUCH INSTANCES, HOWEVER, CONSTITUTE A SMALL MINORITY OF PROPOSED PROJECTS. IT IS OUR VIEW THAT THE OIL COMPANIES OPERATING ON THE NORTH SLOPE, AS WELL AS OTHER INDUSTRY, UNDERSTAND THE NEED FOR, AND HAVE MADE GOOD FAITH EFFORTS, TO PROTECT THE ENVIRONMENT WHILE CARRYING OUT THEIR BUSINESS ACTIVITIES. CONTINUATION OF THE SECTION 404 PROGRAM ON THE NORTH SLOPE IS NOT INCONSISTENT WITH SUCH DEVELOPMENT. THE PARTICULAR VALUE OF THE SECTION 404 PROGRAM IS THAT IT BRINGS GOVERNMENTAL AND PRIVATE INTERESTS TOGETHER TO REVIEW THESE ISSUES AND REACH AGREEMENT ON THE BEST METHOD FOR PROCEEDING. IT IS THE CONTINUATION OF THAT MECHANISM THAT IS OF PRIMARY IMPORTANCE TO THE NORTH SLOPE BOROUGH. AS THE GOVERNMENTAL ENTITY, AND THE PEOPLE MOST DIRECTLY AFFECTED BY THESE ACTIVITIES, IT IS CRUCIAL THAT THE NORTH SLOPE BOROUGH BE CONSULTED BEFORE DEVELOPMENT TAKES PLACE AND THAT OUR CONCERNS AND POLICIES BE MADE PART OF FINAL DECISIONS.

TO THE EXTENT THAT THIS COMMITTEE OR THE ADMINISTRATION IDENTIFIES PROBLEMS WITH THE PROGRAM, WE BELIEVE THEY SHOULD BE HANDLED ADMINISTRATIVELY, THROUGH CHANGES IN THE PROCEDURES AND CRITERIA OF THE APPLICABLE REGULATIONS. SHOULD ANY SUCH CHANGES BE INITIATED, WE REQUEST THAT THE NORTH SLOPE BOROUGH

BE FULLY CONSULTED AND BE CONSIDERED AN ACTIVE PARTICIPANT IN ANY REVISION OF THE SECTION 404 PROCEDURES WHICH MAY AFFECT REVIEW OF THE WETLAND AREAS OF THE NORTH SLOPE AND THE ACTIVITIES THAT TAKE PLACE THERE. WE ARE AWARE THAT THE BOROUGH HAS MORE WETLANDS THAN THE MAJORITY OF THE STATE, AND WE WANT TO ENSURE THAT THEY ARE ACCORDED ADEQUATE PROTECTION. IF PROBLEMS EXIST WITH THE PROCEDURES, CHANGE THEM, NOT THE BASIC PROTECTIONS AFFORDED BY SECTION 404. WE BELIEVE THIS PROGRAM CAN BE ADMINISTERED IN A REASONABLE MANNER THAT ACHIEVES THE ULTIMATE GOALS OF THE STATUTE WITHOUT REQUIRING OVERLY STRINGENT PROCEDURAL REQUIREMENTS.

WE APPRECIATE THE OPPORTUNITY TO SUBMIT THESE COMMENTS. I WILL BE PLEASED TO ANSWER ANY QUESTIONS YOU MIGHT HAVE.

MUNICIPALITY OF ANCHORAGE

TESTIMONY ON WETLANDS REGULATIONS

Tony Knowles, Mayor
July 7, 1982

TESTIMONY ON WETLAND REGULATIONS

July 7, 1982
Municipality of Anchorage

INTRODUCTION

The Municipality of Anchorage welcomes this opportunity to present testimony on wetland regulations. Approximately 25% of the land area within the Anchorage Bowl is classified by the Army Corps of Engineers as wetlands. Presently, Anchorage has a very short supply of good land suitable for development. The impact of classifying a quarter of this area as potentially undevelopable land is a very serious situation.

Primarily for this reason, we have conducted a 2-year process to prepare the Anchorage Wetlands Management Plan. This Plan has adapted the wetland regulations to local land-use needs. In our testimony today we would like to describe how the Plan balances preservation and development needs and how it can serve as a model for other cities and corporations who would try to work within the Section 404 regulations. We will also detail suggested changes in the regulations themselves which we believe are necessary to reduce the complexity and the time required to obtain Section 404 permits.

THE ANCHORAGE WETLANDS MANAGEMENT PLAN

Faced with a strong, effective, Federal regulatory program, significant amounts of wetlands within city boundaries, large future demand for land for legitimate community growth, and a Comprehensive Plan that stressed preservation of valuable wetland areas, the Municipality began, in 1980, a study of Anchorage wetlands. The intent of that study was to develop a management plan that would protect the most valuable wetlands but would allow the least sensitive or least valuable wetlands to be developed. This is an expression of the balanced use concept under our Comprehensive Plan.

After a long, tiring process the objectives of the study have been achieved. The Wetlands Plan has been prepared and consists of the following elements:

- Identification and mapping
- Wetland classification
- Resource inventory and evaluation
- Assignment of use designations
- Development of management stragegies
- An inventory of mitigation measures

Because the Corps of Engineers has agreed to be guided by the use designations given in the Plan, the Plan now serves as the basis for Section 404 permit decisions in Anchorage. The Plan has adapted local land use policies to the Federal wetlands permit program.

Completion of the Plan has provided the following benefits to the Anchorage community:

- It provides a balanced approach and resolves a resource conflict. Development is allowed to proceed on 98% of privately owned wetland, but critical wetlands, totaling 41% of wetlands in Anchorage, are preserved, primarily those in government ownership. Owners are to be compensated for private land designated for preservation.

- The Plan is areawide in approach.
- It provides predictability and local input into the Section 404 permit process.
- It provides integration with the coastal management, water quality management and comprehensive plans.
- It leads to a general permit which will significantly reduce permit processing time and costs to both the private and public sectors.

Draft general permits, based on the Plan have recently been issued by the Corps of the Engineers. If they are issued in final form with just a few minor changes that we have suggested, the permits will do much to reduce the time, cost and difficulty in obtaining wetland permits in the less sensitive wetland areas in Anchorage.

RECOMMENDED CHANGES IN REGULATIONS

Because of our success in adapting to the Section 404 regulations, we do not recommend extensive changes either to the basic law or the regulations that translate the law into action. Some wetlands are valuable; they provide open space, contribute to fish and wildlife habitat, moderate floods, and maintain high water quality. If the critical wetlands are developed, Federal, State and local government will be faced with the financial burden of compensating for lost wetland functions. Strong Federal legislation is needed to protect these critical wetlands because of the inherent urbanizing development pressures on privately owned wetland.

But not all wetlands have critical functions. We have, in Anchorage, land classified as "wetland" that is in reality a thin, one-foot layer of peat soil over 10-15 feet of some of the best gravel soils left in the area. These "wetlands" can safely be developed to meet land demand for housing, schools, recreation facilities, and commercial buildings without loss of important functions. Any minor loss in value can be mitigated through proper site design or through the control and treatment of stormwater runoff.

The changes we believe are necessary in the wetland regulations would make a distinction between valuable and less valuable wetlands. We would recommend that some burden of proof be placed on the Federal and State review agencies to show significant value for wetlands in a State or a region before restrictions and permit requirements are imposed.

The intent of these changes would be to balance these values with competing land uses. If the balancing procedure indicated low value, then a simplified, shortened permit process could be triggered to reduce costs to developers and landowners. Where high value is indicated, a strong Federal regulatory program must be retained to prevent development in critical wetlands. We would not recommend that the program be delegated to the States. A streamlined but tough Federal program is necessary to protect the critical wetland areas.

We also support reductions in the time necessary to process wetland permits. With uncertain markets and high interest rates for interim construction loans, builders often cannot anticipate their development plans. The delay of 90-120 days necessary to obtain a Section 404 permit, combined with

Alaska's short construction season puts an unfair burden on the construction industry. We recommend the greater use of general permits for non-sensitive wetlands to speed up permit processing.

There are two areas where additional Federal funds could help reduce the impact of the Section 404 program on local government. The first of these is Federal funding for wetland studies that will clarify wetland locations and values. In our Plan we have identified several wetland areas that need additional study. Federal funds to conduct these studies would be helpful. The second need for assistance would be increased availability of Federal funds for acquisition of critical wetland areas. There are some programs now that provide funds for this purpose, but they need to be expanded.

Finally, we recommend that greater Administrative controls be placed on the personnel involved in the review and approval of wetland permit applications. While these people may be well intentioned, many discussions on individual permits deal with minor details not directly related to wetland values. Administrative rules need to be adopted by the agencies involved in permit processing to restrict these reviews to pertinent questions of wetland value and function.

SUMMARY

In summary, the Municipality has recently completed a Wetlands Management Plan in order to resolve conflicts between wetland development and preservation in the Anchorage area. With the issuance of general permits based on the Plan, most of the wetland permit problems for Anchorage will be resolved.

Some changes to the wetland regulations are needed. Regulatory activity and restrictions on development should focus on the valuable wetlands, leaving landowners free to develop the less critical wetland areas. Conversely, a strong, Federal program is needed to prevent development of wetlands with critical resource value. Greater use of general permits is recommended to reduce permit processing time. Wetland reviews by agency personnel should be more rapid and should be limited to wetland issues.

This concludes our Testimony; I would be glad to answer any questions Committee members may have concerning the Anchorage program.

TESTIMONY OF
RONALD A. KREIZENBECK
ALASKA OPERATIONS OFFICE DIRECTOR
REGION 10
U.S. ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

July 8, 1982

I am pleased to be here today to talk with you about the 404 program and its operation in Alaska. Since the last specific hearings before this subcommittee on Alaska and section 404, approximately two years ago, some noteworthy changes have been taking place in the 404 program.

In the context of these changes, I would like to generally outline EPA's role in the Dredge and Fill Discharge Program under section 404 of the Clean Water Act. I will also address more specifically the issues of permits, state transfer and regulatory reforms, especially with respect to the program's operation in Alaska. One of EPA's primary responsibilities in this program administered by the Corps is to develop 404(b)(1) environmental guidelines in conjunction with the Army, and to review their proper application. While called "guidelines", they have been promulgated as regulations, and are the basis for evaluating the physical, chemical, and biological effects of discharges of dredged and fill material on the waters and wetlands of the United States. EPA reviews proposed actions to determine whether they are in compliance with the guidelines and, where appropriate, proposes mitigating conditions or alternatives that would lessen adverse environmental impacts. Under section 404(c), the EPA Administrator has final authority to veto use of an aquatic site for disposal if it would result in unacceptable impacts on municipal water supplies, shellfish beds and fishery areas, wildlife or recreational areas.

EPA is also responsible for transferring the 404 program to interested states and for helping to prepare states for that transfer. In addition to these responsibilities, EPA works with the Corps of Engineers and the Department of Justice to implement enforcement of the program. EPA's Office of General Counsel and its Regional counterparts represent EPA in 404 matters when legal action is taken against the Agency.

Over the last two years, EPA has been working to improve the effectiveness and efficiency of the 404 program. This effort has been significantly expanded and the pace of reform accelerated by the May 7, 1982 issuance of the recommendations of the President's Task Force on Regulatory Relief on the section 10 and 404 programs. Over the last two years, most EPA regional offices have begun to participate in joint processing of permits on either a regular or periodic basis. Joint processing involves a meeting where the federal agencies, and often state and occasionally local agencies, come together to review permit applications and share information.

Joint processing allows for faster permit processing, more efficient use of the agencies' resources, less duplication of effort, and more effective environmental review. When states become involved in the review process it also allows for better coordination between Federal and state permitting requirements. There is currently a concern, however, that these activities not be conducted in the absence of project sponsors. This is to avoid the perception that agencies may be working together to unfairly prejudge or stop projects. EPA regions have also been involved with the Corps of Engineers in developing general permits to reduce the number of actions which are subject to individual permitting requirements. We have participated actively in the developing of approximately 30% of the general permits that have been issued by the Corps, and have commented on several hundred proposed general permits nationally.

A major focus of EPA activity over the last two years has been in the area of state involvement in the program. States have an important role in the 404 program, even when the Corps of Engineers retains permitting authority. Under section 401 of the Clean Water Act, states must certify that a 404 permit issued by the Corps will not adversely affect state water quality standards. A 404 permit must have this state certification before it takes effect. Under section 307 of the Coastal Zone Management Act, states must also certify that any activity proposed in the coastal zone is consistent with the state's approved coastal zone management plan. Many states, as well as local and regional agencies, are actively involved in the permit review process.

To ensure that the maximum level of participation is afforded to the states, Congress added section 404(g) in 1977 to provide for transfer of the program to interested and qualified states in all waters other than those which are presently or potentially navigable.

Although the EPA's regulations for state programs have been out for over two years, no state has yet requested the program. However, we can report a substantial increase in EPA's activities to help promote the development of state 404 programs. We have funded program development grants in eight states. These are in addition to three state program studies that had been funded by the Fish and Wildlife Service. Four of the grantee states either have or are developing "pilot" permitting programs through special arrangements with the Corps. We feel that these pilot programs are a major step toward program transfer. We hope to transfer the program to these states soon after the completion of the pilot studies.

EPA has given the State of Alaska a 404 program development grant to assess the feasibility of program transfer, and, the work effort is under way in the Alaska Department of Environmental Conservation. The study will focus on the technical, legal, administrative and resource considerations for the state if the state were to take over the program. Final recommendations will address whether the environmental protection function of the 404 program and maximum administrative efficiency can better be achieved through state assumption of the 404 program. We hope the results of the study lead to a primary role for Alaskans in the development and protection of resources within their state's borders.

There are three major reasons given as to why state transfers have not occurred to date. The first obstacle is the first obstacle is a state's willingness to fund the operation of the program. Although states receive grant funds under sections 106, 205(g) and 205(j) of the Clean Water Act, which may be used for a state 404 program, they must fund some portion of the 404 program with their own revenues. However, once the reform noted below are implemented, we feel that a number of states may be able to use staff and funds from existing regulatory programs to minimize or even eliminate the need for additional state resources.

The second reason cited by some states, is that even after transfer, the Corps retains jurisdiction over the traditionally navigable waters of the United States. In Alaska, however, even with this statutory restriction, significant areas of jurisdiction would revert to State control if Alaska assumed section 404 responsibilities.

The other major problem for states has been dealing with the intricacies of EPA's Consolidated Permit Regulations. These EPA regulations contain the requirements for state transfer and operation of five different permitting programs, including 404. The Consolidated Permit Regulations were the subject of a separate review by the President's Task Force on Regulatory Relief. Based on that review, each program will have a separate regulation governing state transfer and operation. EPA's revised 404 state program regulations will be streamlined; reporting and oversight will be reduced; and states will have more discretion in developing their programs as long as they meet essential environmental requirements and basic minimum procedural requirements. We are optimistic that more flexible program requirements, along with increased efforts to promote state assumption, will result in significant progress toward state programs. This is an important component of EPA's contribution to achieving the Administration's goal for a "New Federalism."

As I mentioned earlier, the 404 program was also the subject of a review by the President's Task Force. The administrative reforms developed by the Task Force are being implemented right now by the Corps, EPA, the Fish and Wildlife Service, and the National Marine Fisheries Service. There are five major areas of reform: reducing uncertainty and delay in the permit review process (404(q)); giving states more authority and responsibility; reducing conflicting and overlapping policies; expanding the use of general permits, and clarifying the scope of the permit program. I would like to focus briefly on EPA's particular role in implementing these reforms.

The 404(q) cooperative Memorandum of Agreement which was signed with the Corps in 1980, provided for a maximum of five levels of review for controversial permits, where objections between EPA and the Corps could not be resolved. While EPA has only invoked the elevation to the highest level 11 times, the multiple levels of review and long delays introduce a higher degree of uncertainty and pressure upon many permit applicants. We are now in the final stages of revising the agreement to provide only one higher level of review by the Assistant Secretary of the Army for Civil Works or his designated review official within a greatly shortened time frame.

As I noted, we are already simplifying the requirements for state program transfer and expect to propose simplified regulations this fall. In addition, the reforms call for increased use of general permits for activities which are authorized by a state regulatory program that is substantially similar to 404. EPA will assist the Corps to develop such permits. We will contribute the benefits of our experience in working with the states to assure that all potential state regulatory programs are identified and understood, and that the kind of reviews provided by the state programs are sufficiently comprehensive and detailed to ensure environmental protection equivalent to that of the 404 program.

We are also initiating a revision of the 404(b)(1) environmental guidelines to shorten and simplify them and to make them consistent with the other reform measures. EPA has just formed an internal task force to study problems caused by the existing guidelines with the intention of recommending improved guidelines later in the year. EPA will work with the Corps to expand the use of general permits.

We will help identify activities that will exempt the maximum number of discharges from the individual permit requirement, while ensuring that generally permitted activities will not have significant individual and cumulative impacts. EPA will also assist in developing appropriate best management practices which should be included as conditions of the general permits.

Finally, EPA will work closely with the Corps to clarify the scope of jurisdiction of the 404 program to reduce uncertainty whether a 404 permit is required. We will develop new and more specific criteria to redefine the scope of the program.

Now I would like to focus briefly on Alaska's wetlands. In 1979, using new regulatory definitions, the Corps of Engineers asserted interim jurisdiction over wet tundra areas of the North Slope. Approximately 50-75% of the Arctic Coastal Plain along the North Slope came within the application of this definition. Permafrost remains close to the surface and this portion of the tundra contains standing water and numerous shallow lakes in summer.

This type of arctic tundra serves as an important habitat for resident and migratory wildlife, especially birds. Birds come from as far away as South America, Asia, the Carribbean, and the South Pacific, as well as North America. Ninety-seven species breed in the North Slope, and of these, 44 breed in the coastal zone. The two largest caribou herds in North America, estimated at 440,000 animals, roam across the arctic tundra.

From EPA's perspective, within the last two years, I believe we have improved the 404 operation in Alaska. In the year ending this May, EPA's Alaska operations office reviewed approximately 631 permits. Of these, EPA recommended approval of 519 permits, approval with conditions of 90 permits, and disapproval of only 22. Out of the 22 that we objected to, our concerns were resolved for six projects. Several of the others are still pending. The permit activity in Alaska is increasing, but the proportion of projects which EPA is obligated to object to is on the decrease. This is a tribute to the Corps of Engineers' efforts at early coordination and improving the quality of permit application.

General permits are used widely and are significantly reducing the number of activities subject to individual permitting. Last October, three general permits were issued for the North Slope; they cover storage, drilling, and general pads and access roads for oil and gas and related support facilities on wet tundra. They were carefully developed through the close cooperation of the major resource agencies, including representatives from the regulated community.

These three general permits include two unusual processing conditions. First a preapplication conference is required for the applicant to meet with resource agencies and determine the site specific adjustments which should be incorporated into the project. Second, the applicant submits a permit application which is circulated for a strictly limited 15 day review.

Processing applications under these general permits takes about 30 days, and 90% of the activities on the North Slope are covered under them. This is a review mechanism which reduces delays and administrative burden, while still protecting valuable and fragile tundra resources. EPA has reviewed numerous projects under these general permits, and the numbers are increasing from month to month.

In addition, EPA has worked with the Corps to develop and issue five general permits for minor activities in the City of Sitka. These permits were developed through the city's coastal management program.

A number of general permits have been issued for construction of native villages, and others are being developed for minor activities in Anchorage. The Anchorage general permits are being developed in conjunction with the city following an extensive wetlands study and ordinance completed by the City, with financial help from EPA's 208 program. We feel that the permits in Sitka and Anchorage are particularly important because they were developed out of local planning efforts and reflect local needs for environmental protection and economic development.

I hope these remarks have been helpful in providing a useful overview of the interwoven roles of EPA and other Federal and state agencies in carrying out the current 404 program. EPA will continue to work closely with the State of Alaska in the present program. EPA looks forward to assisting the State of Alaska in its progress towards assuming the primary role in the dredge and fill program allowed for in current law.

COMPTROLLER GENERAL'S
REPORT TO THE CONGRESS

DEVELOPING ALASKA'S ENERGY RESOURCES: ACTIONS NEEDED TO STIMULATE RESEARCH AND IMPROVE WETLANDS PERMIT PROCESSING

DIGEST

Alaska's Federal lands are rich in energy, wildlife, and scenic resources. Energy exploration and development in this unique environment has given rise to elaborate, costly, and sometimes controversial measures designed to minimize negative impact.

To determine if Federal agencies are advancing environmentally sound approaches to energy exploration and development, without unnecessarily increasing energy costs, GAO

--analyzed the results of oil and gas-related experience on the Kenai National Wildlife Refuge, the only Federal land in Alaska where significant production has occurred (see p. 5);

--evaluated measures used in Alaska prohibiting exploratory drilling during certain months of the year (see p. 15) and controlling drilling waste disposal (see p. 20);

--evaluated the adequacy of research to lessen the impacts of energy development (see p. 22); and

--evaluated wetlands permitting, which is of crucial importance to energy development on all Alaskan lands (see p. 27).

NEED FOR ENVIRONMENTAL IMPACT RESEARCH AND SITE-SPECIFIC KNOWLEDGE FOR EFFECTIVE REGULATION OF ENERGY DEVELOPMENT

Additional research is needed to evaluate the effect energy exploration and development has had on Alaskan Federal lands. Increased site-specific research and knowledge are necessary to assure that cost-effective and environmentally sound impact mitigation techniques are utilized, as demonstrated with the management of oil and

Tear Sheet

gas activities on the Kenai National Wildlife Refuge. The research itself is costly, however, and should be planned and coordinated with existing efforts.

GAO found that two costly and controversial restrictions were being widely applied to energy exploration in the Arctic. Currently, offshore oil and gas drilling is only allowed during five months of the winter with little flexibility for start and completion dates. The seasonal drilling restriction, while initially developed for offshore drilling, is now being applied to onshore activities. The second restriction requires the disposal of drilling waste in impermeable pits, even though some Government and industry officials believe it may not always be necessary. GAO found that inadequate research exists to support either the imposition or removal of these restrictions.

Site-specific research findings would allow refinement of environmental protection controls suitable to the unique characteristics of the lands to which they are applied. Gathering of site-specific data to allow application on a case-by-case basis, followed by impact-related research to further refine controlling stipulations, could allow energy exploration to proceed on a more timely and less costly basis. Research should also facilitate opening lands to exploration, enhance production possibilities, and increase expected Federal revenues.

GAO's findings are particularly pertinent to the Congress in its consideration of recently proposed legislation with regard to Arctic research. S.1562, would prioritize, fund (using a small portion of revenues from leasing Federal lands on the North Slope--both offshore and onshore), and coordinate Arctic research. Thus, it could help fill the research gaps identified in this and previous reports--but any research funded by the Federal Government should be subject to the budget process. (See pp. 24-26.)

WETLANDS PERMITS: DELAYS AND CONTROVERSIAL STIPULATIONS

Wetlands permits are required for many Alaska oil and gas projects. Consequently, the permit issuing agency--the U.S. Army Corps of Engineers--has become of primary importance to Alaskan energy development. Costs of this development have increased because the Corps has been late in meeting goals established for processing wetlands permits. For example, of the 167 permits GAO reviewed, 127 were late when compared to the Clean Water Act issuance goal of 105 days. The average issuance time for fiscal year 1981 permits was 152 days.

Delayed public notices and automatic extensions to agency comment periods caused significant portions of permit processing delays. The Corps' Alaska District has not, on the average, issued public notices within the 15-day period specified by law. Delays also occurred because of extensions to the 30-day public comment period. About 51 percent of the permits reviewed involved comment period extensions, most of them requested by the State of Alaska.

In addition, the Corps imposes controversial and costly permit conditions without assuring that these conditions are, in fact, needed. The need for these conditions, which are frequently proposed by various Federal and State agencies, is not substantiated by site-specific data and research findings. Seasonal drilling, waste disposal, and pipeline height requirements are among those imposed without specific substantiation. (See pp. 27-33.)

RECOMMENDATIONS

To promote environmentally sound and cost-effective approaches to exploration and development activities in Alaska, GAO recommends the following:

--In its consideration of S. 1562 and other related proposals, the Congress should provide for three critical elements: coordination, prioritization, and a source of funding for research evaluating the impacts of energy development in the Arctic. Conceivably, a small portion of the revenues derived from Federal leasing of offshore and onshore lands on the North Slope could be set aside in a special trust fund for that purpose. Appropriate congressional controls could be maintained by requiring disclosure of planned expenditures as part of the budget process. (See p. 36.)

--The Secretary of the Interior should utilize existing research findings and site-specific data to the maximum extent possible and--after a source of further funding is worked out--direct and use additional site-specific research in the application of stipulations to future Alaskan energy projects. This should include using such data as a basis for determining whether the seasonal drilling restriction should be continued as a general stipulation for individual tracts.

In addition, to expedite the issuance of wetlands permits, the Secretary of the Army should

--grant extensions for public comments to the State of Alaska only when they are adequately justified and use research findings and site-specific data to the maximum extent possible in determining the need for proposed stipulations in future permits,

--require that Federal agencies support the need for proposed permit stipulations to the maximum extent possible with site-specific data and relevant research findings, and

--direct the Chief, Corps of Engineers, to have the Corps' Alaska district management periodically summarize the time required to issue public notices and enforce the 15-day time frame established by law. (See p. 36.)

AGENCY COMMENTS

Comments on a draft of this report were received from the Department of the Army (app. I) and the Department of the Interior (app. II).

The Assistant Secretary of the Army for Civil Works expressed general support for recommendations addressing permit delays and the need for permit stipulations to be justified, and indicated that improvements in the area can be accomplished through issuance of appropriate policy guidance to the Corps. More detailed comments are addressed in chapter 5.

Interior agrees that there is a need for more studies to determine long-term effects of energy development in Alaska and for more site-specific research, but it takes exception to numerous portions of the report. The nature of these comments indicates a substantial misinterpretation of various report segments. Important areas of exception are summarized below.

--Interior states that the report ignores research pertinent to the issues discussed. In fact, the report considered ongoing research efforts, including those specified by Interior, in concluding that more effort is needed. GAO's conclusions are fortified by findings of scientific groups and by a foremost consultant in this field. Interior itself agrees that more research is needed.

--Interior disagrees that costly permit conditions are imposed without substantial evidence that they are necessary. Yet, GAO found no supporting justification for stipulations imposed in 45 of the 111 wetlands permits reviewed. The permit issuing agency, the Corps of Engineers, agrees such justification is needed.

--Interior states that the report fails to credit efforts to tailor stipulations to site-specific requirements and provide field staffs with authority to modify stipulations as appropriate. In fact, the report recognizes that Interior did this on the Kenai Refuge, and concludes that these elements will be desirable for future Alaskan energy projects.

Because of the length and nature of Interior's comments, a full text of those comments, annotated with GAO's responses, has been provided in app. II.

CHAPTER 4

MORE EFFECTIVE WETLANDS PERMITS WILL FACILITATE ALASKAN OIL AND GAS EXPLORATION AND DEVELOPMENT

Delayed issuance of U.S. Army Corps of Engineers (Corps) wetlands permits hampers Alaskan oil and gas projects. Automatic extensions to the public comment period [1] and late issuance of public notices contribute significantly to this delay. In addition, the Corps imposes permit stipulations without requiring documentation and support from the agencies which propose them. The necessity for some of these stipulations is questionable.

Permit delays and extraneous stipulations increase costs of oil and gas exploration and development. The Corps and the Alaska Wetlands Task Force have tried to expedite permit processing and reduce regulatory paperwork and duplication. However, more needs to be done to reduce permitting delays and to ensure that permits contain only justifiable stipulations.

Wetlands are an important national resource, providing habitat for fish, animals, and birds. Estimates of the amount of Alaska wetlands range from 131 to 300 million acres. Wetlands may serve as flood control systems, storm buffers, pollution filters, and may lessen erosion along coastal lands. Because of these many potential uses, proposed activities affecting wetland areas are scrutinized by a number of Federal and State agencies (see app. V). In Alaska, wetlands comprise extensive areas on the energy-rich North Slope. Consequently, Corps' permitting has become of prime importance in Alaskan energy development.

Section 404 of the Federal Water Pollution Control Act of 1972 (FWPCA) designated the Secretary of the Army, acting through the Corps, to permit discharge of dredge and fill material into United States waters, including wetlands. The 1977 Clean Water Act amendments to FWPCA establish certain permit processing time limits, provide for general permits, provide for State administration of wetland programs with Federal approval, and call for agreements between the Corps and other Federal agencies.

These agreements were to minimize duplication, paperwork, and delays. In March 1980, the Secretary of the Army signed such agreements with the Administrator of the EPA and the Secretaries of Commerce, the Interior, Agriculture, and Transportation. One objective of the agreements was to help assure that the permit processing time requirement is met. The various processing goals are summarized below.

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[1] This period henceforth will be referred to as "agency comment period," since our focus is on agency comments.

Table 1

Wetland Permit Processing Goals

Process	Goal	Type
From receipt of application to permit issuance	3-1/2 months (105 days)	Statutory; memorandum of agreement
From receipt of application to public notice	15 days	Statutory, regulatory
From public notice to receipt of agency comments	a/ 1 month (30 days)	Regulatory

a/Under unusual circumstances, extensions may be granted up to 75 days.

The flow chart on page 29 depicts these goals and related permit processing steps.

CORPS WETLANDS PERMIT DELAYS

In order to evaluate the Corps' permitting process for onshore oil and gas activity, we analyzed all wetlands permits issued for such activity in Alaska during the period February 1980 through September 1981. The total number of permits issued in Alaska in this category was 167. Comparing the time frame to issue these permits with the Clean Water Act goal of 105 days, we found that:

- --150 days was the average processing time for the 167 permits we reviewed and
- --40 permits were issued on time, but the remaining 127 were late for varying amounts of time, as shown below:

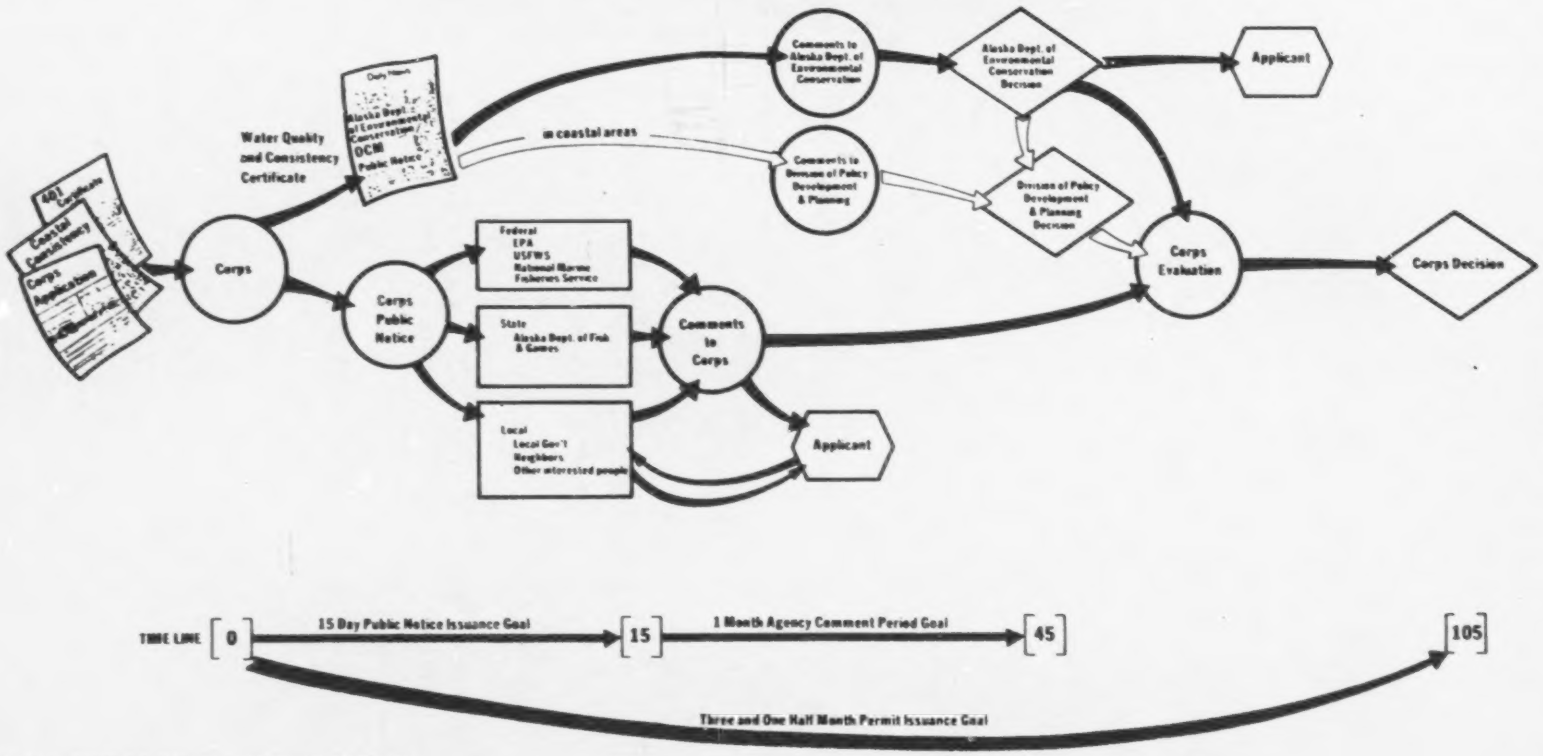
Table 2

Permits Categorized by Number of Days Late

	Days late				
	1-30	31-60	61-90	91-120	Over 120
Number of permits	38	38	28	12	11

Our analysis showed that (1) delays by the Corps in issuing public notices and (2) virtually automatic extensions to agency comment periods accounted for significant portions of the delays experienced.

THE PERMIT PROCESS FOR WETLANDS


401 Certificate
Coastal Consistency
Corps Application
Corps
Water Quality and Consistency Certificate
Daily News
Alaska Dept. of Environmental Conservation/ OCM Public Notice
in coastal areas
Comments to Alaska Dept. of Environmental Conservation
Comments to Division of Policy Development & Planning
Alaska Dept. of Environmental Conservation Decision
Division of Policy Development & Planning Decision
Applicant
Corps Public Notice
Federal
EPA
USFWS
National Marine Fisheries Service
State
Alaska Dept. of Fish & Games
Local
Local Gov't
Neighbors
Other interested people
Comments to Corps
Applicant
Corps Evaluation
Corps Decision
TIME LINE
0
15 Day Public Notice Issuance Goal
15
1 Month Agency Comment Period Goal
45
105
Three and One Half Month Permit Issuance Goal

SOURCE: Alaska Department of Environmental Conservation as Modified by by GAO

Delayed public notices

After receiving a permit application, the Corps is required to issue a public notice containing information about the location, nature, and scope of the proposed wetlands activity and to provide copies of such notice to interested parties. The Corps' Alaska District has not, on the average, issued public notices within the 15-day period specified by law and Corps regulations. For fiscal year 1981, the Alaska District averaged 21 days to issue public notices after complete applications had been received, and 50 of the 75 permits issued were issued late. Between February and September 1980, the average time to issue public notices was 28 days, and 61 of the 85 were issued late. The Alaska District Chief of the Regulatory Functions Branch for the Corps said processing backlogs cause the greatest delay in issuing public notices, once applications have been completed.

In June 1980, we reported that three Corps' districts (not including Alaska) were not meeting the 15-day public notice requirement and recommended that districts periodically summarize the time required to issue such notices and enforce the 15-day time frame established by law. 1/ Our work in Alaska showed that the Corps' Alaska District also has been and continues to be delinquent in meeting the 15-day time frame and still is not summarizing statistics showing the time required to issue public notices.

Extended agency comment periods

The Corps of Engineers has routinely and repeatedly granted extensions of time for agency comments on wetlands permit applications. However, the regulations provide that extensions of up to 75 days can be granted "if unusual circumstances warrant." Despite this, 51 percent of the 167 permits reviewed involved extensions to agency comment periods which the Corps granted without requiring specific justification. Consequently, the 30-day comment period specified in Corps regulations is frequently exceeded, and permit issuance delayed.

Agencies' requests did not support or justify the need for extensions. The State of Alaska's Division of Policy Development and Planning received 80 of these extensions, resulting in an average delay of 41 days. Two Federal agencies, the FWS and EPA, were granted the remaining 11 extensions. Extensions granted to all agencies delayed issuance of the permits by an average of 42 days, ranging from 8 to 135 days. These findings are summarized in the following table.

1/"Managerial Changes Needed to Speed Up Processing Permits For Dredging Projects," CED-80-71, June 9, 1980.

Table 3

Length of Extensions to 30-Day Agency Comment Period

	(Days) Average extension	Range (days)	Number of extensions
State of Alaska Division of Policy Development and Planning	41	15 - 135	80
U.S. Fish and Wildlife Service	49	8 - 90	9
Environmental Protection Agency	60	60 - 60*	2
Total	42	8 - 135	91

*EPA received two extensions, each for 60 days.

Extended agency comment periods contributed significantly to delay in issuing Alaska wetlands permits affecting onshore oil and gas-related construction projects. Our June 1980 report also found that extensions to Federal agency comment periods caused permit delays in other States. In Alaska, however, most of the extensions granted by the Corps are to State, rather than Federal, agencies. The State agencies are not required to justify the need for extra time. Federal agencies are so required, by memorandums of agreement with the Corps.

The average processing time (150) days extended the processing time goal (105) by 45 days. Comparing the 42-day average length of extensions to this 45-day delay indicates that comment period extensions account for a significant portion of overall delay. Corps of Engineers' officials stated that this was indeed the case and that extensions granted to State agencies were the biggest problem.

Alaska Corps of Engineers' officials advised that extensions are automatically granted to the State because the State has lengthy periods of time, by law and regulation, to do coastal zone management consistency determinations and water quality certifications. Both of these State actions are required for a wetlands permit to become effective. The District Engineer for Alaska advised that he was considering holding the State to the 30-day comment period and issuing the permit on time. However, no action could be taken under the wetlands permit until the State completes its certifications.

The March 1980 Corps' memorandums of agreement with Federal agencies require documentation for extensions to the comment period. This requirement seems to have discouraged Federal agencies from requesting automatic extensions. For example, only one undocumented extension was requested by a Federal agency for any permit applied for after March 1980. In contrast, the FWS and EPA requested 10 automatic extensions for permits applied for prior to issuance of the memorandums of agreement. Additionally, these agreements appear to have improved timeliness. For example, the Corps averaged 185 days to issue permits applied for prior to March 1980. For permits applied for after March 1980, the Corps' average issuance time was 133 days. Thus, the agreements may have contributed to a reduction in average issuance time of 52 days.

The Corps, however, lacks a memorandum of agreement with the State of Alaska--the major recipient of these extensions--which would provide that the need for comment period extensions be documented.

Delays increase costs

Delays in issuing wetlands permits in Alaska caused by extensions to reviewing agencies' comment periods increase energy exploration costs. For example, on April 3, 1980, an oil company applied for a wetlands permit to construct a drilling mud pit on the east dock of Prudhoe Bay. In reviewing this application, the State's Division of Policy Development and Planning requested and received from the Corps seven extensions totaling 135 days. As a result of these extensions, the Corps issued the permit in 225 days, or 114 percent longer than the goal included in the Clean Water Act. The oil company claimed that permit delays negated planned summer construction and resulted in more costly, inefficient, and complicated winter construction. According to the Alaska Oil and Gas Association's Manager for Exploration and Production Affairs, project costs more than doubled.

Although no summary cost figures are available for Alaska, the American Petroleum Institute reported in March 1980 that 55 Corps permit delays in Southern Louisiana cost the industry $19 million. The report estimates lost or deferred production totaling 428,000 barrels of oil and 14.9 billion cubic feet of gas because of these permit delays.

GENERAL PERMITS

In addition to granting individual wetlands permits, the Corps grants general and nationwide permits which cover generally minor and non-controversial projects having no significant environmental impact. Projects authorized by general and nationwide permits are usually not subject to lengthy processing because such permits authorize specific categories of activities in advance. Thus, if an applicant's dredging or filling needs fall within these previously specified categories, little or no paperwork or delay will likely occur.

The Corps has used general permits in Alaska to reduce delays. In March 1979, the Corps issued general permits for certain oil company construction activities on the North Slope. The permits covered the expansion of existing pads and the extension of existing roads on wet tundra. We reviewed all of the authorization letters issued under the 1979 general permits and found that processing times averaged 63 days. This compares quite favorably to the Corps' fiscal year 1981 average processing time of 152 days for regular wetlands permits.

UNSUPPORTED PERMIT STIPULATIONS

Overall, we found that 66 of the 111 permits which contained stipulations had some site-specific support for these stipulations provided by the proposing agency, including Fish and Wildlife Service. However, the remaining 45 lacked site-specific support for the stipulations which were included.

The Corps does not require that agencies establish the need for proposed stipulations with site-specific data and research findings. The need for some of these stipulations, which have been included without such support, is controversial. For example, some Corps permits prohibited drilling except during winter months, required impermeable waste disposal pits, and established a minimum pipeline height for animal crossings. As discussed in chapter 3, seasonal drilling restrictions and impermeable waste pits are costly, and their effectiveness has not been established. The questions surrounding the necessity for the expensive elevated pipeline animal crossings were discussed in our January 1981 report entitled: "Trans-Alaska Oil Pipeline Operations: More Federal Monitoring Needed."

TESTIMONY ON
THE IMPLEMENTATION OF SECTION 404
OF THE CLEAN WATER ACT
IN ALASKA

presented to the
SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION
of the
SENATE COMMITTEE ON ENVIRONMENT
AND PUBLIC WORKS
by the
National Wildlife Federation
July 8, 1982

INTRODUCTION

Senator Murkowski, members of the staff, my name is Cliff Eames. I'm counsel for the National Wildlife Federation at the Alaska Natural Resource Center here in Anchorage. The National Wildlife Federation is the nation's largest conservation-education organization with over 4.1 million members and supporters, nearly 4500 of them in Alaska.

I'd like to thank you very much for the opportunity to speak to you today about Section 404 and its importance in Alaska. We believe that Section 404 is vitally important to protecting the physical, biological and chemical integrity of the waters of Alaska, especially the wetlands that support our abundant fish and wildlife resources.

This morning I'll briefly answer three questions. First, why regulate activities in waters and wetlands, especially in Alaska? Second, how does the Section 404 program work? Third, what are the results of regulation through Section 404 in Alaska?

I. Why Regulate Waters and Wetlands.

The primary purpose of the Section 404 program is to restore and maintain the physical, biological and chemical integrity of the nation's waters through regulating the disposal of dredged or fill material. Wetlands are an integral part of this nation's waters and provide a number of essential functions that benefit society. Unfortunately for years these wetland values have been misunderstood or overlooked, and as a result, the nation has lost more than 40 percent of the wetlands that once covered the lower 48 states. Let's try not to repeat that mistake here.

Probably the most visible role wetlands play is the provision of essential habitat for fish and wildlife. Thirteen million ducks, geese, and swans migrate to Alaska in the summertime and use wetlands as resting, breeding and nesting areas. These waterfowl create hunting opportunities not just in Alaska but nationwide as well. In 1980, 5.3 million hunters spent $658 million dollars in pursuit of migratory waterfowl nationwide.

Wetlands also provide food, cover, spawning grounds, and nursery areas for salmon, trout, char, whitefish and many other species of fish. The Kenai River system, for example, contributes as much as 35% of the total salmon population of Cook Inlet, and accounts for millions of dollars worth of salmon for the commercial fishery and many thousands of angler-days of recreational fishing. Nationwide the wetland-dependent commercial fish harvest is valued at nearly $12 billion; in 1980 recreational fishermen spent roughly $13 billion on fishing activities directed toward wetland-associated species.

Many other species are also dependent on wetlands during a portion of their life cycle. These include moose, caribou, bear, bald eagles, beaver, song birds, and hundreds of other species, both game and non-game. In 1975 resident Alaskans spent nearly 13 million man-days enjoying wildlife-related recreational activities. Sportsmen alone spent almost $146 million dollars in hunting and fishing-related expenditures. Alaskans, moreover, benefit from urban as well as rural wetlands, Potter Marsh being the most obvious example in Anchorage.

Wetlands also control erosion, reduce turbidity in rivers, reduce flood levels during storms, recharge groundwater and reduce pollutants in the water system. Not all wetlands produce these benefits all of the time, but I can safely say that wetlands in Alaska provide all of these services. Section 404 protects a very important resource, one that produces benefits for all Alaskans.

II. How Does the Section 404 Program Work?

Contrary to frequent assertions, Section 404 does not prohibit the filling and use of wetlands and thus stop development. Operation of the program bears this out; only 6 Section 404 permits were denied by the Alaska District of the Corps of Engineers out of 274 permits processed in fiscal year 1981. In fiscal year 1980, 11 permits were denied out of a total of 226 permit applications processed. This trend is indicative of the program nationwide, were less than 2 percent of all Corps of Engineer permits (Section 10 and Section 404) are denied each year. In most cases, Section 404 permit application and review allows development projects to move forward, and frequently conditions are imposed that minimize the effects on water quality and fish and wildlife habitat. Nationwide, applicants apply to the Corps for approval of projects that would destroy about 600,000 acres of wetlands annually; through modifications and conditions to permits, half of this wetland destruction is prevented.

There are specific issues concerning the implementation of the Section 404 program that should be addressed: 1) the jurisdiction of the program, 2) the time required to process permit applications, and 3) the role of the state in Section 404.

A Program Jurisdiction

In 1972 the Congress--not the courts, as many people seem to believe--gave the Corps jurisdiction under Section 404 over not just traditionally navigable waters but "all waters of the United States." When the Corps failed to expand its geographic coverage beyond navigable waters, the courts were asked to interpret Congress's intent. In March 1975 the Federal district court for the District of Columbia ruled that Congress intended the Corps to regulate dredge and fill activities in all waters subject to the Commerce Clause. Congress reviewed and ratified this judicial determination in 1977 when it rejected attempts to roll back the Corps' jurisdication.

The issue is before Congress again this session. S. 777 sponsored by Senator Bentsen of your Committee would restrict Section 404 to "waters which are used or are susceptible to use in their natural condition or by reasonable improvement, as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark..." This change would substantially restructure the implementation of Section 404 in Alaska, excluding many important Alaskan wetland resources from federal oversight under the 404 program. Of the 221 Section 404 permits issued in Alaska in fiscal year 1981, almost half (105) were for activities in non-navigable waters. These activities would not be covered under S. 777.

Nationwide, only 17 percent of the permits processed by the Corps are for activities in non-navigable waters. Yet 85 percent of the nation's 148 million acres of wetlands fall under this non-navigable classification. Reducing the jurisdiction of Section 404 will not significantly reduce the permit load, but will have a significant impact on the wise and balanced use of the nation's wetlands.

There has been a certain amount of uncertainty concerning which waters are covered by Section 404. In Alaska, some people have questioned whether tundra or wetlands that are perched above permafrost should be included as part of the Corps' program jurisdiction. However, these wetlands are no different from wetlands in other parts of the country that are perched above impermeable bedrock or clay. These tundra wetlands are just as valuable to ducks, geese, swan, moose, bear, and other wildlife as are prairie potholes or bogs or other types of perched wetlands.

The Corps of Engineers in cooperation with other federal agencies is now in the final stages of developing a technically sound methodology that can be used in the field to identify regulated wetlands based on three parameters, soils, hydrology, and vegetation. This "Multiple Parameter Approach" is an important first step in clarifying, for the regulators and the public, waters under the jurisdiction of Section 404, and should be given a chance to work. This approach to defining wetlands is more rational than that of S. 777, which avoids the problem by eliminating jurisdiction.

B. Permit Processing Time

Probably the most frequent criticism of the Section 404 program is that it takes too long to get a permit. We support the most efficient processing of permit applications under Section 404 and the elimination of unnecessary regulatory requirements, consistent with the protection of the nation's waters. Our review of Corps, Environmental Protection Agency, National Marine Fisheries Service and Fish and Wildlife Service data indicate that the processing of permit applications under the Section 404 program does not take an unreasonable amount of time, and nationwide, permit processing is becoming more efficient as the program matures.

In Alaska, it takes an average of between 90-100 days to process non-controversial permit applications. The average is closer to 200 days for those projects that are considered controversial--that are objected to by the state or by a federal agency and require some sort of modification before permit issuance. The average for all permits is about 170 days, a little more than the national average, but there are some very good reasons why it should take longer on the average to process permits in Alaska. The vastness of the State and our sometimes less than benign weather increase the time it takes to perform the on-site reviews that can be essential prerequisites to fair and reasonable decisions. Some reviews aren't possible except during the summer. Additionally, Alaska lacks the resource baseline data that is frequently available elsewhere, so that necessary studies are more apt to hold up decisions. Additional funding for wetland inventories and other baseline research would help solve this latter problem. Finally, I suspect that most people would agree that additional funding and manpower for all of the reviewing agencies' regulatory components could not help but bring permitting times down.

There are measures that can be taken by District Engineers that will minimize permit processing delays: Many of these have already been incorporated to some extent into the program operation in Alaska.

First, general permits can be issued for categories of similar activities that have a minimum individual and cumulative impact on the environment. To date, the Corps has issued 361 regional and 13 nationwide general permits and estimates that they have elminated the need for approximately 60,000 individual permits each year. The Alaska District has issued several general permits.

Second, careful planning, pre-application consultation with the Corps and other agencies, and the submission of a complete application by the applicant will result in significant reductions in delay. Applicant assistance packets being updated by the Corps of Engineers and recently produced by the State Department of Environmental Conservation will help alert developers to ways they can speed the permit review process. According to the Corps the one factor causing the greatest amount of delay is applicant inaction. Both the reviewing agencies and the applicants have a responsibility to act in a timely fashion.

Third, federal and state agencies can coordinate more effectively to speed permit review. The Alaska District and the State have developed one permit application for Section 404 permits, Section 401 state water quality certifications and Coastal Zone Management consistency determinations -- one-stop shopping for the applicant. The Alaska District also coordinates with other federal agencies in periodic meetings to review controversial permits and enforcement activities.

C. The State Role in Section 404

States have the opportunity to take over administration of the 404 program in all non-navigable waters. Programs delegated to the states are subject to EPA approval. No state has yet assumed the Section 404 program, primarily because of the potential costs of administering the program, EPA's detailed program requirements, and some states' interest in controlling all waters, not just non-navigable ones.

We support state regulation of non-navigable waters under Section 404 subject to an objective set of performance criteria. And, we believe the takeover criteria could be more flexible and are willing to work with the Corps and EPA to develop a program more attractive to the states. Since these non-navigable waters are national resources, however, the federal government should assure that the state programs meet all the requirements of the Clean Water Act. Sufficient state program criteria must remain to conserve these resources and to provide for adequate federal oversight.

III. What are the Results of Section 404 in Alaska

It's nice to be able to finish on a very positive note. One of the major problems facing Alaska when hearings were held on Section 404 implementation almost exactly two years ago was the lack of knowledge among many members of the public concerning both wetland values and the mechanics of the 404 program. Although we haven't yet completed the task of fully informing Alaskans, we have made significant strides. Both the Corps of Engineers and the Fish and Wildlife Service have produced and distributed informative brochures about wetlands and the 404 program. An EPA-Fish and Wildlife Service film on wetlands that contains some excellent Alaskan footage has been shown throughout the state. The Corps has taken a very attractive color photo display to many Alaskan cities. Finally, as we noted earlier, one applicant assistance booklet has been completed, by the State Department of Environmental Conservation, and the Corps' applicant assistance packet is now in the process of being updated.

The desire to bring about increased involvement of local governments and their citizens in wetlands management plans was a recurring theme at the previous Alaska hearings. Now two cities have completed plans, Sitka and Anchorage. Sitka was first, and its plan was the basis for the issuance of five general permits. Anchorage's plan was just recently approved, and work on several general permits for Anchorage is presently going forward.

Another thing that we have gained over the past two years is a track record -- one to be proud of. I would like to share with you a few examples of permit actions that have occurred over the past few years that demonstrate how the program works to allow development, protect resources, and in some cases, even save the developer money through improved design.

In 1981, an oil company applied for a permit to construct an oil and gas exploratory well pad in the Colville River Delta that would destroy more than 7 acres of wetlands. The area is extremely important for spawning and overwintering arctic char and whitefish. Whistling swans and polar bear also use the area. During the permit review process, it was recommended that the developer modify the project to use a new thin pad technique that reduces the environmental damage and simplifies site rehabilitation after the exploratory activities are complete. By adopting this recommendation, the applicant saved more than $1 million in construction costs. The entire permit process took about 6 months.

In another case, the city of Seward proposed a Marine Industrial Park at the mouth of Fourth of July Creek where it enters Resurrection Bay. The proposed park would have required the placement of 2 million cubic yards of fill over 48.5 acres including 21.5 acres of wetlands and would have destroyed a small spring-fed salmon stream. Seward proposed mitigating the loss of salmon by constructing a costly fish hatchery. During the permit review process, federal agencies recommended an alternative plan to create new spawning channels and adjacent wetlands to offset habitat loss at a much lower cost than the proposed fish hatchery.

There are many more examples of efficient and effective permit processing under Section 404 in Alaska that I could share with you. Alaska's program has matured into a balanced program of cooperation between federal, state, and local governments. Real progress is being made toward solving the administrative problems that do exist. Based on our experience in Alaska we urge this subcommittee to support the Section 404 program and to refrain from making any changes that would reduce the minimum level of resource protection that the program now provides.

Thank you.

July 8, 1982

ALASKA MINERS ASSOCIATION COMMENTS
on the
Clean Water Act
Prepared for the
ALASKA FIELD HEARING
SENATE COMMITTEE OF ENVIRONMENT AND PUBLIC WORKS

The Alaska Miners Association appreciates having this opportunity to express our concerns and suggestions regarding the Clean Water Act, Section 404 program relative to Alaska.

We have not yet experienced the considerable adverse effects of the 404 program that others have, particularly the petroleum industry. This is due primarily to the fact that there have been relatively few major mining operations commenced since the 404 program began. While we don't have case histories to provide, we do understand the extent of the requirements under this program, and do not want to be faced with trying to obtain this type of permit with the regulatory process that currently exists.

After study of the overall effect of the 404 program, it is our belief that the following problem areas must be addressed:

- Full scale, individual 404 permits are required for operations or activities without regard to the actual potential adverse impact on the affected water body.

- Full permit processing, with its commensurate expensive delays, is required even when mitigation measures are agreed upon early in the process.

- General permits are not utilized properly or to the extent possible to reflect Congress' intent of simplifying the overall permit program.

- The Corps of Engineers' jurisdiction over tundra is unnecessarily broad and does not reflect biologic realities.

- The 404 program frequently forces duplication of efforts required by existing state laws.

- Congress has not provided all reviewing agencies with guidance for developing permit stipulations. This can result in the imposition of stipulations that may not be reasonable, necessary, or germane to the purposes of the Clean Water Act.

- Reviewing agencies are not required to provide written justification of permit stipulations.

- Multiple layers of review and a lack of review deadlines result in considerable delay, contrary to the intent of Congress as stated in Section 404.

- Provisions for state assumption of the program are far too burdensome and have thoroughly discouraged states from seeking delegation.

In order to obtain comprehensive and lasting reform, both legislative and regulatory changes must be made. The legislative proposals we would recommend are as follows:

- For those wetlands that remain under federal control, require the Secretary to develop a classification of wetlands that can be used to (1) universally determine whether the water body is indeed a wetland and (2) determine, based on the nature of the wetland, what type of permit is necessary and what mitigation stipulations are required.

  Amend Section 404(b) to require the Secretary to utilize the earlier mentioned classification criteria to set forth those wetlands which can be adequately protected under general permits and thus may routinely be considered under a general permit.

- Amend Corps and outside agency review to ensure that (1) all permit stipulations address water relative environmental concerns and (2) all stipulations are accompanied by a statement of rationale.

- Amend the state primacy provisions to simplify the requirements and limit the federal role to oversight in states with primacy. For example, eliminate federal veto power over individual permits once a program has been delegated.

- Give the State of Alaska more authority over its wetland resources.
  - Limit the federal jurisdiction under Section 404 jurisdiction to those waters that are currently navigable or susceptible to navigability by reasonable improvement, together with wetlands that are adjacent to the waters.

- Irrespective of the full scope of the Corps' statatory jurisdiction, the Act should give the Corps the discretion not to exercise that jurisdiction so it can focus the use of its resources where the needs and benefits are greatest.

The balance of these comments will address one of our top priorities--the general permit program.

As a rule, individual permits should only be required where there is a reasonable basis for concern that the terms and conditions of a general permit would not adequately address the water-related impacts. However, past and present administration of the program has resulted in most 404 permits being individual rather than general. This is evidence to us that the general permit provisions of Section 404(e), an important legislative change made in 1977, are not being fully implemented.

We urge increased use of a variety of different kinds of "general" permits and abbreviated permit reviews currently allowable under the Act. General permits with generic stipulations can be structured to address specific types of activities or classes of wetlands and waters, or a combination of these. Limited or abbreviated reviews can be used to focus only on those concerns that cannot be addressed generically. The Act should be amended to provide the Corps (or states delegated the 404 authority) with the latitude and incentive to maximize the use of such permits so that the regulatory requirements correlate to the needs and benefits of the program.

If all the remedies discussed today are achieved, industry will be greatly relieved of excessive regulation while at the same time adhering to the intent of the Act. We encourage the Senator and other parties here to thoughtfully consider the constructive proposals we have provided. Thank you.

National Audubon Society
ALASKA REGIONAL OFFICE
308 G STREET, SUITE 219, ANCHORAGE, AK 99501 (907) 276-7034

TESTIMONY OF

DAVID R. CLINE

NATIONAL AUDUBON SOCIETY

BEFORE THE

SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION

SENATE COMMITTEE ON ENVIRONMENT

AND PUBLIC WORKS

PUBLIC HEARING ON

WETLAND MANAGEMENT

ANCHORAGE, ALASKA

JULY 8, 1982

AMERICANS COMMITTED TO CONSERVATION

INTRODUCTION

Senator Murkowski and members of the committee staff, my name is David R. Cline. I am Alaska Regional Vice President for the National Audubon Society. I am testifying today on behalf of our more than 2,000 Alaska members and 450,000 nationwide.

As one of our country's oldest and largest conservation organizations, Audubon has maintained a long standing commitment to the protection and wise use of our nation's wetlands. This includes those being managed in our own 75 unit sanctuary system.

I would first like to commend you, Senator Murkowski, for providing Alaskans an opportunity to present their views on the important subject of wetlands. It is particularly appropriate that you are giving special consideration to the Alaska situation. As is the case with many of our nation's natural resources, Alaska's wetlands occur on a scale that defies the imagination. These valuable habitats and their attendent fish and wildlife resources are the envy of sportsmen, conservationists, and millions of other citizens throughout the nation.

I would also like to take this opportunity to thank you for what Audubon believes have been enlightened positions on the reauthorization of two other vitally important national conservation laws; namely, the Clean Air and Endangered Species Acts. We are convinced that your positions on both are economically and ecologically sound, and consistent with the wishes of the overwhelming majority of Americans, including those of us fortunate enough to live in Alaska.

Many Alaskans take great pride in the fact that we now have more wetland habitat protected in wildlife refuges and parks than any other state. The world renowned wetland complexes in the Yukon Flats and Yukon Delta National Wildlife Refuges for example, provide safe breeding habitat for several million ducks, geese, and swans. This is not to mention untold numbers of waterbirds, shorebirds, passerines, and a variety of resident mammals.

It is now well documented by wildlife biologists that wetland habitat on Alaska's Yukon Flats and Arctic Coastal Plain, are especially important to migratory waterfowl in years when drought plagues the prairie states and provinces. It is in such times that millions of "displaced" ducks and geese move north to the more stable and dependable breeding habitat in Alaska. Thus, these northern wetlands serve as a safty valve to our continent's migratory waterfowl resource, preventing what might otherwise prove to be cataclysmic population declines. In fact, if the current trend of wetland degradation continues elsewhere on the continent and eventually causes breeding waterfowl populations to become permenantly displaced, one could speculate that Alaska's wetlands might well prove the only hope for maintaining viable populations of many species of wildlife over the long term.

In passing the Alaska National Interest Lands Conservation Act of 1980, Congress, on behalf of millions of Americans, saw fit to protect wetland habitats on substantial federal lands in Alaska. This action itself should clearly demonstrate just how valuable these areas are to the nation. It should also serve as an incentive to local and state government agencies, and private land owners to do more to protect wetlands wherever they occur in our state.

As the Section 404 wetlands permitting program is examined in Alaska, it is important for all of us to keep in mind that it constitutes a vital component of the larger issue under debate here and nationally, i.e., reauthorization of the Clean Water Act. After extensive debate and with the overwhelming support of the American people, Congress passed the Clean Water Act in 1972. Principle aims of this much needed legislation were to attain "fishable and swimmable" waters by 1983, and an end to discharge of pollutants into waterways by 1985. Although important progress has been made toward these goals, the fact they have not yet been attained causes us to argue for a re-authorization of a strengthened Clean Water Act, rather than a weakened one. Public opinion polls show that support for such legislation is as strong if not stronger now than in 1972. Thus, we strongly oppose proposals by the Reagan administration that would weaken the law and cause more delays in a program that is already lagging badly.

Since 1972 there has been considerable progress made in successfully implementing Section 404 here in Alaska. One of the principle reasons for this is the commitment and dedication of career professionals in state and federal resource agencies. I would like you to know that we feel especially indebted to Colonel Lee R. Nunn, recently retired Alaska District Engineer for the Corps of Engineers (CE). In our opinion, Colonel Nunn has done a superior job of administering the 404 program in Alaska. Conservationists have been particularly impressed with his strong and effective leadership, willingness to articulate facts on wetland issues to all who are interested, and his sense of fair play in dealing with complicated wetland issues. We will miss working with Colonel Nunn.

WETLAND PROBLEMS AND 404

After many years of experience in wetlands as a duck hunter, wildlife viewer, and professional conservationist, I am convinced that our nation's wetland protection effort is in serious trouble. As pointed out recently by the Wildlife Management Institute, "... unless some significant changes in laws, policies, and attitudes are made, there is no future for a large portion of wildlife that depend on wetlands. Many of the waterfowl, shorebirds, songbirds, and other animals enjoyed by millions of people will disappear." So too will hunting, trapping, wildlife viewing, and a variety of other recreational and educational opportunities.

Despite the fact the federal government has been acquiring wetland habitat for migratory birds and other wildlife for nearly 80 years, these habitats continue to disappear at an alarming rate throughout the Lower 48. Best estimates indicate that our nation has already lost more than 40 percent of its original wetland acreage. Included are more than half of the productive prairie potholes in the upper Midwestern states, and three-quarters of the bottom land hardwoods of the lower Mississippi Delta. Not to be overlooked is the fact that this tragic loss of wetlands has occurred under what we might refer to as privatization, i.e., private ownership of public assets.

Why should Alaskans be concerned? The fact is the aforementioned wetlands constitute critically important migration and wintering habitat for many Alaskan wildlife species. Should these habitats continue to disappear, it is only a matter of time before Alaskan migratory bird populations will similarly decline.

Even though wetland values in Alaska are of proven state, national, and international significance, the CE staffing and budgeting is not commensurate with districts in the Lower 48 states. This appears to be one of the most serious problems affecting administration of the 404 wetland program in Alaska. The results are an overworked CE professional staff; few pre-application informational meetings; often limited resource information being provided review agencies and the public; and inadequate CE participation in permit mediation, monitoring, and enforcement. This situation is inturn having a demoralizing effect on resource professionals and causing frustration to permit applicants and public interest groups alike.

The notion that the 404 permitting program is prohibiting development in wetlands, or unduly delaying such development needs to be dispelled. On the contrary, the overall aim of the program is to strike the best possible balance between protection of wetlands for their numerous public values, and permitting legitimate wetland development projects to proceed for private and/or public benefit.

During 1981, we understand that the CE issued 221 wetland permits in Alaska while denying only six and referring none. Furthermore, the average time for issuing permits has been only 140 days. This is better than the national average and improving. These statistics depict a permitting program that is functioning in a manner that is reasonable and fair. In fact, too much so in some instances, for questionable wetland dredge and fill operations continue to crop up around our state including here in Anchorage.

Any permitting program that is worth anything requires adequate time to process individual permit applications. It is a well known fact that it took three years longer than what the North Slope oil producers originally requested, to finally get the go ahead for construction of the Trans Alaska Pipeline System (TAPS). Yet, it is now widely agreed, even by the pipeline owner companies themselves, that the project is a better one because of the delay. Even so, there are to this day unresolved wetland related problems associated with TAPS.

We also have great concern for the growing tendency to issue general permits for development activities in wetlands. Because individual wetlands possess unique physical, chemical, and biological attributes, it is generally best to examine proposed developments on a case by case basis. Only after comprehensive research and planning by an interdisciplinary team of resource specialists, can we support the issuance of general 404 permits.

In no case should such permits be issued simply to expedite development in wetlands or the flow of paperwork in a federal bureaucracy.

Monitoring of approved wetland permits and enforcement of permit provisions by the CE has been less than adequate. In fact, we have heard of only two cases where fines have actually been levied for illegal dredge and fill activities in wetlands. It is very difficult for us to believe that the 404 permit program is working that well. Without effectual permit monitoring and enforcement by the CE, the integrity of the entire 404 permit program could be placed in jeopardy.

The suggestion that tundra should not be considered wetland simply because it is underlain by permafrost is not sound ecologically. Scientists inform us that it is primarily the hydrology at the root zone of plants that should be the prime determinant of whether a natural community is classified as a wetland, not the nature of any impermeable layer that may lie beneath. This holds true whether the substrate consists of clay, rock, or permafrost. The fact that many tundra communities support a prevalence of vegetation or aquatic life that requires saturated or reasonably saturated soil conditions for growth and reproduction, clearly qualifies them for wetland status in our minds.

SUCCESSES AND FAILURES

I would now like to provide four examples of how the 404 permitting process is working in Alaska. In Juneau, negotiations between Fish and Wildlife Service biologists and developers led to relocation of a low income housing project 50 feet away from the shoreline of Jordon Creek. In another case, biologists persuaded the borough government to construct a high water bypass in Jordon Creek rather than dredge out an oxbow used as a spawning channel by salmon. In both cases, mediation of 404 permit applications resulted in the protection of a valuable urban anadromous fish stream at little or no cost to the permittee. In fact, property values will undoubtedly be benefited as a result, both as a result of stream aesthetics and the presence of spawning coho salmon and Dolly Varden trout.

Although only recently adopted, the Anchorage Wetlands Plan is another success story. The plan represents a major step forward in developing a mechanism for making tradeoffs between wetland preservation and development in a major urban environment. Implementation of the plan must now be closely monitored to assure that its intent is met.

Development activities in Juneau's Switzer Creek wetlands is an example of shortcomings in the 404 permitting process. This formerly productive and scenic wetland once supported healthy fish and wildlife populations, and constituted a popular local hunting area. It is now occupied by an unsightly landfill and illegal sand and gravel dredging operation. Leachates from the land fill are likely polluting the entire wetland while the dredge and fill operation continues without permit or a restoration plan. All this within view of visitors traveling nearby Egan Drive in Alaska's capital city.

RECOMMENDATIONS

Following are a number of suggestions for improvement of the 404 permit program in Alaska:

1. Incentives to Wetland Owners: Greater effort should be made to develop realistic incentives for private wetland owners to protect their holdings. Other options would include donation of the wetlands themselves or associated development rights to state or federal wildlife agencies, or private

groups. We urge that legislation (HR 6465) such as that recently introduced in Congress by Robert J. Lagomarsino be given thorough evaluation in this regard. HR 6465 is designed to provide tax relief to those who are willing to sell wetlands to government agencies or certain tax-exempt organizations, if use of such land after the sale is for conservation purposes. The legislation also provides partial federal estate tax relief in cases where estate taxes become due during a transfer of property.

2. Agency Budgets: According to a CE manpower and budget analysis, a three-fold increase in staffing (from under 30 employees at present to 60-75) is badly needed to adequately meet the agency's responsibilities under Section 404. Budget increases should provide for establishment of satellite CE offices in Juneau and Fairbanks to better serve permit applicants and provide monitoring and enforcement of permit stipulations. Future budget cuts that would weaken resource agency permit and license review functions, e.g., the Fish and Wildlife Service's ecological services program, should also be avoided.

3. Permit Application Functions: Given adequate staffing, the CE should get more aggressive in anticipating developments in wetlands, and hold preapplication informational meetings with permit applicants. Such meetings would serve to expedite the permit review process by better informing applicants how the process works, and the information expected of them in their applications.

4. Mediation: In those cases where problems develop between a permit reviewing agency and an applicant, the CE should be required to become more involved

in the mediation process. This should help prevent stalemates from developing, and discourage illegal dredge or fill activities with resultant destruction to fish and wildlife habitat.

5. Permit Monitoring and Enforcement: Monitoring of approved wetland permits, and enforcement of permit provisions by the CE need to be greatly strengthened. This will require increased staffing and travel funds. Prompt and vigorous enforcement action is essential to maintain the integrity of the 404 permit program when illegal dredge and fill activities are detected in wetlands.

6. Research: Coordinated wetland inventories and baseline research need to be given greater emphasis. This will enable scientists to better understand the structure and functioning of Alaska's wetlands. The end result should be cost savings in the permit review process, and to wetland development projects.

7. Applicant Responsibility: Wetland developers need to accept greater responsibility for approaching the wetland permitting process in a more positive way. By first recognizing that wetlands have many public values for which they have a degree of responsibility, they should then provide comprehensive information as to their plans to the review agencies. I believe the record will show that in most cases when this has been done, the permit review process has proceeded quite smoothly.

8. Wetland Acquisition: Because many of Alaska's migratory birds depend on wetlands in other states for critical migration and wintering habitat, wetland acquisition under such programs as the Duck Stamp

Act, Water Bank Act, Land and Water Conservation Fund, and the "404" Permit Program should be vigorously supported. Such programs are strongly supported by sportsmen, conservationists, and many willing sellers.

9. Alaska Wetlands Task Force: This worthwhile project should be given greater recognition and support. There appears a need to more clearly define the task force's objectives, however, and make its working committees more accountable for producing specific end products. The task force should also be encouraged to develop a strong and effective public information/education program on Alaska's wetlands.

10. Wetlands Classification: A standardized wetland classification system and associated nomenclature should be adopted for Alaska's wetlands. This will tend to avoid unnecessary confusion due to varying terminology, and bring greater consistency to wetland mapping efforts.

CONCLUSIONS

We believe that the Clean Water Act's Section 404 permit program has been working reasonably well in Alaska and deserves our strongest support. Because of increasing demands on Alaska's vast yet limited wetland resource from such activities as oil and gas development, agriculture, mining, urban sprawl, and proposed extraction of extensive coal and peat deposits, the program needs to be strengthened, not weakened. This should be done through reauthorization of the Clean Water Act, yet in such a way as to assure all those seeking a 404 permit expeditious and fair processing of their applications.

As a national goal for protection of wetlands including those in Alaska, I strongly recommend continuance of the policy articulated in Executive Order 11990 which reads in part, "...to the end that the Nation may attain the widest range of beneficial uses of the environment without degradation and risk to health or safety, each agency, to the extent permitted by law, shall avoid under taking or providing assistance for new construction in wetlands unless the head of the agency finds (1) that there is no practicable alternative to such construction, and (2) that the proposed action includes all practicable measures to minimize harm to wetlands which may result from such use.

The 404 permit program should continue to be supported and administered judiciously by the CE. Every effort must be made, however, to overcome serious staff and budgetary deficiencies currently hindering the CE program. Greater effort must also be made to assure ongoing CE monitoring and enforcement of permit provisions. What is at stake is one of our greatest national assets--Alaska's wetlands.

Thank you for your consideration.

STATEMENT OF
ROGER HERRERA, MANAGER EXPLORATION

SOHIO ALASKA PETROLEUM COMPANY

BEFORE THE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
U. S. SENATE

ANCHORAGE, ALASKA
JULY 8, 1982

Senator Murkowski, Committee Members, Ladies and Gentlemen:

My name is Roger Herrera, and I am the Manager for Exploration Operations in Alaska for Sohio Petroleum Company. Sohio, as an operator of the Prudhoe Bay oil field and a major interest holder in other oil and gas leases on the North Slope, has long been concerned with the increasing complexity and burdens associated with the Corps of Engineers regulatory process. We have submitted, for the record and for your review, a detailed analysis of this regulatory mechanism and the problems it presents. Our analysis explains why regulatory and statutory changes to Section 404 of the Clean Water Act, and Section 10 of the River and Harbor Act of 1899, are necessary in order that the oil industry may develop oil and gas leases in Alaska in a manner which furthers the national interest in reasonable and expeditious petroleum exploration and development.

When the Prudhoe Bay oil field was initially being developed, Sohio was able to obtain the necessary approval and permits from the State regulatory agencies involved in a fast and practical fashion. History has shown that construction and development of the Prudhoe Bay field was and is being carried out in an environmentally responsible way. Prudhoe Bay stands today as a landmark of how a giant oil field should be planned and operated in an environment which is deserving of protection. Many of the measures used to preserve that environment were initiated by the companies themselves as self-imposed measures and were not mandated by statute, regulation or stipulation. For example, efforts were made to prevent damage to the tundra and to lessen soil erosion effects. Gravel sources were located and extracted from environmentally acceptable incised meanders of rivers. Culverts and other features were routinely used to prevent interruption of the natural flow of streams and rivers. Great care was taken to avoid any duplication of facilities and to protect tundra areas which, for a variety of reasons, were recognized as especially sensitive. We also perfected the drilling of oil wells through the permafrost in a manner which prevented the hot oil produced from those wells from melting and interfering with the permafrost layer.

All of those problems were identified and solved at the time of the initial construction of the Prudhoe Bay field under State regulations alone. The Corps of Engineers is now the dominant regulatory body governing North Slope construction projects. No significant improvement in the way these North Slope projects are planned or constructed has been introduced as a result of the Corps regulatory process. Furthermore, the Corps regulations have shown themselves to be cumbersome, unwieldly and sometimes illogical, and they have directly resulted in delay, inappropriate stipulations and a huge increase in costs. They have also introduced a significant uncertainty into the planning process for oil and gas development in Alaska to the benefit of no one.

Some of the controversial permitting problems which Sohio has had to cope with in recent years are outlined in our written submission. Typifying those problems have been the long delays associated with the attempted construction of gravel islands in the Sag Delta area of the Beaufort Sea for exploration operations and the recent difficulties encountered in the permitting for the multi-billion dollar waterflood project for the Prudhoe Bay field itself. Similar difficulties with the Corps process have been encountered in the permitting for Sohio's Kuparuk River crossing to allow for the development of part of the western area of the Prudhoe Bay field oil column. All these problems and delays have been the result of the extensive and expanded Corps of Engineers regulatory process. The problem is not, and I stress, not the result of an intentional slowing or burdening of the process by the administrators of these permits at the local or national level.

Another example of the continuing difficulty of the Corps of Engineers regulatory process is seen by examining the general permits which were intended to streamline the whole permitting procedure. This was to be achieved by means of quick approval of projects which fit within broad guidelines. In Alaska, authorization under a general permit can only be aquired if the concurrence of all potentially commenting agencies on the proposed project is obtained in advance. Thus if any agency objects to the project, and even if that agency were to object for reasons completely outside the scope of its regulatory or legislative responsibilities, (a situation which is by no means unknown), then the applicant would be forced to go through the long-winded normal permitting procedure leading to the inevitable delay of many months.

As a result of the foregoing difficulties, Sohio participated with some other companies and the American Petroleum Institute in the development of comments on this subject which were submitted to Vice President Bush's Regulatory Reform Task Force, and we ourselves wrote language for a set of regulations which we believe could substantially improve the process now overseen by the

Corps. A copy of these prepared regulations is attached with our written submission.

Vice President Bush, through the Office of Management and Budget, has recently proposed a streamlining of the Corps regulatory process. This OMB document suggests a six point proposal for regulatory relief as follows:

1. Reduce uncertainty and delay by simplifying the Corps of Engineers permitting decision making process, and by reexamining or eliminating the several Memoranda of Agreement between the Corps and other agencies which were established pursuant to Section 404 (q) of the Clean Water Act.

2. Allow the Corps to defer its authority to appropriate State agencies when such agencies have adequate laws to safeguard an area from any permitted action.

3. Reduce conflict and overlapping policies by improving operational controls. In particular this refers to conflicts brought about by State actions on certification requests. It would also result in a shortening and simplification of the EPA's Section 404 (b)(1) guidelines.

4. Expand the use of general permits and thus minimize delay and eliminate duplication with other federal programs.

5. Clarify the scope of the Corps permitting program specifically by limiting its control of the Nation's wetlands.

6. Review administrative reforms to ensure that all regulations, guidelines and Memoranda of Agreement adopted by the Corps are consistent with the goals of regulatory reform.

Sohio totally approves and endorses the thrust of the OMB charter, and we urge that Vice President Bush and your committee, Senator, should strongly consider the particular impacts of Section 404/10 regulatory schemes on Alaskan wet tundra areas. We also urge that special provisions should be introduced by regulation or statute to limit the Corps of Engineers jurisdiction on the huge regions of Alaska overlain by wet tundra.

With regard to legislative action, it is not possible to make an assessment of needed legislative reforms until implementation of the OMB charter has occurred and formal agency rule-making procedures are established. This is expected in November 1982. However, even if the proposed reform program is implemented in a timely fashion, certain legislative changes to Section 404 appear to be necessary.

1. The specification of any disposal site for any permit is governed by guidelines comparable to the ocean dumping criteria under Section 403(c), which explicitly pertains to the effects of "pollutants". These criteria are not appropriate as guidelines for deposition of gravel in wetland areas or "other waters of the United States".

2. In Section 404(b), a decision to prohibit specification of a site can only be reviewed on the basis of the site's economic impact on navigation and anchorage. Inclusion of the nation's energy interests as a basis for decision is also appropriate.

3. The specification of a disposal site in Section 404(c) provides that the location of a site may be prohibited on account of "unacceptable environmental effects" on municipal water supplies, shellfish beds and fishery areas, or wildlife or recreational areas. This very broad term is undefined in the statute and further clarification of it would add consistency and predictability to the permitting process.

4. In Section 404(e) (1), general permits may be issued only if the activities being permitted for a category of activities are "similar in nature" and if such activities, individually and cumulatively, "will cause only minimal adverse environmental effects". Moreover, the ocean dumping guidelines under Section 403(c) are likewise applicable to general permits. General permits are thus made applicable only to small, insignificant activities, and legislation should be implemented to expand the use of general permits beyond these narrow purposes.

5. In Section 404(3) (2), general permits may not exceed five years duration, and can be revoked or modified if the authorized activities have "an adverse impact on the environment". The very broad term of "adverse impact" seriously compromises the utility of general permits and the five-year limitation makes little sense. Both limitations should be relaxed to enhance the use of general permits.

6. Currently, there are several bills pending in the U. S. Congress which address Section 404 of the Clean Water Act. For example, S777, introduced by Senators Tower and Bentsen is pending before your

> Senate Committee on Environment and Public Works. In addition, its companion bill, H.R. 3962, introduced by Congressman Hightower, is pending before the House Committee on Merchant Marine and Fisheries on which Congressman Don Young serves as a member. Both of these bills appear to be appropriate vehicles for responsible refinement of the Clean Water Act to enable the Corps of Engineers to achieve most effectively the Act's purpose - protecting the chemical, physical, and biological integrity of the Nation's navigable waters.

In conclusion, Sohio believes that the Corps-regulated program should be reformed and that it should not cover the regulation of State and private wetland areas in Alaska. Adequate justification for this conclusion comes not only from our own experiences but also from the opinions of Alaskans as indicated late last year in responses to the questionnaire submitted to Senator Ted Stevens by his constituents. In that questionnaire, only 10.9% of the 6,700 responding Alaskans felt that the Federal Government should be regulating Alaska wetland areas. This appears to be in stark contrast to agency opinions you have heard expressed today favoring continued Federal 404/10 jurisdiction. It is obvious that this is a dream program for bureaucrats and a nightmare for Alaskans.

We consider that the Federal regulations governing the Corps of Engineers permitting process have been grossly distorted over the years and are now far different in their effect from the original scheme intended by Congress when Section 404 was adopted. Changes to the Corps of Engineers regulation mechanisms, therefore, are essential if significant delays and added unnecessary costs are to be avoided in the development of our future energy resources in this State.

We believe that Alaska has the potential to provide a substantial and reliable source of energy for the Nation. But our energy future hinges to a large extent on a reasonable and reasoned approach to the problems we have discussed here today.

We urge you, Senator Murkowski, to take the lead in establishing regulatory and legislative relief from the Corps of Engineers process in order that the oil and gas potential in Alaska can be developed in a logical, rational and timely fashion. Thank you.

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SOHIO ALASKA PETROLEUM COMPANY
COMMENTS
REGARDING REGULATORY AND LEGISLATIVE CHANGES TO CORPS OF ENGINEERS PERMITTING
PURSUANT TO SECTION 404 OF THE CLEAN WATER ACT AND SECTIONS 9 AND 10 OF THE RIVER AND HARBOR ACT OF 1899

Presented to Senator Frank Murkowski
Senate Committee on Environment and Public Works
July 8, 1982, Anchorage, Alaska

In recent years, the Corps of Engineers has become the chief energy regulatory body in the most important energy development area in the United States. This has been accomplished through extensive regulation by the Corps of Engineers of wetlands and navigable waters in the State of Alaska through its expansive application of Section 404 of the Clean Water Act and Sections 9 and 10 of the River and Harbor Act of 1899, which governs the discharge of dredged or fill material in "waters of the United States." The area in which we operate has not received detailed mapping to identify wet tundra. Consequently, for the purposes of obtaining permits, all upland areas are considered wet tundra and construction thereon requires a permit. The large size of the area regulated is depicted on Exhibit A. This regulation has caused significant problems for the oil industry, as it interferes significantly with the ability of the industry to explore and develop the vast oil reserves of Alaska in an expeditious manner. However, this is the result only of the extensive application of the Corps regulatory process, and not with the administration of this process at the local or national level.

Approximately 40% of America's domestic oil reserves are found under a relatively small area of Arctic coastline between the Canning and Colville Rivers. See Exhibit B. Within this area are found the presently producing Prudhoe Bay and Kuparuk oil fields and several other known accumulations of oil which may be produced in the future. All vegetated areas onshore are now considered wet tundra which must be developed with the placement of gravel pads; all of the area offshore is navigable waters and must be developed by the use of artificial islands placed in the Beaufort Sea. The Corps of Engineers regulates all of these gravel placement activities through its responsibilities under Section 404 of the Clean Water Act and Sections 9 and 10 of the River and Harbor Act of 1899 (hereafter, "Section 404/10 Process"). However, except for some Federal leases now existing in the Outer Continental Shelf, all of the land is the property of the State of Alaska and is already regulated by the State in a manner which essentially duplicates the Section 404/10 Process.

THE CURRENT REGULATORY PROCESS

The State of Alaska currently conducts an extensive program of environmental and operational control over the development of oil fields within its jurisdiction. This includes not only the producing Prudhoe Bay and Kuparuk oil fields, but also a significant percentage of the leased acreage in the Beaufort Sea. Most current and all future oil and gas lease sales, whether conducted by State or Federal agencies, will be subject to significant environmental scrutiny before the sales are conducted. In the case of Federal sales, an Environmental Impact Statement will be prepared in each case in accordance with the National Environmental Policy Act before each sale is held.

However, in spite of all this environmental scrutiny, the Section 404/10 Process, as currently administered by the Corps of Engineers, requires that agency to conduct extensive and repetitive environmental analyses and request or obtain the comments from numerous Federal, State and local agencies, as well as the general public, before approving gravel placement permit requests.

The jurisdiction of the Corps of Engineers extends not only to offshore areas in the Beaufort Sea and Outer Continental Shelf, but also to the major portion of the Arctic coastal plain on the North Slope. The North Slope, which is close to the size of the State of California (see Exhibit C), is quite swampy during the brief summer months of June to September due to permafrost preventing absorbtion of surface water. Because of this, scientists have classified portions of this area as "wet tundra," which makes it subject to Corps' regulation pursuant to expansive redefinitions by the Corps of its "wet lands" regulation under Section 404. See Exhibit D, which shows that the wet tundra area on the North Slope is quite extensive, particularly in areas of current concern to the oil and gas industry.

The Corps therefore plays a pivotal role in American energy policy, as they must approve gravel construction facilities utilized for all onshore and offshore oil field development. This extensive permitting scheme has seriously interfered and continues to interfere with the development of America's domestic energy supplies in the following ways:

1. Delay. Under previous State permitting regimes, the oil and gas industry generally received the necessary permits to conduct its construction activities in about 30 to 40 days, a time which has always been easily incorporated into complex industrial planning processes. However, in recent years the Corps of Engineers, together with State and local regulatory bodies, has expanded upon this normal processing time, such that routine permits now take about 110 days on average, a near tripling of the previous experience at Prudhoe Bay. If any controversy develops about a permit, or if the permit is for a substantial project, then the time rapidly grows to 150 to 180 days or more. And, for those very major

permits which require an Environmental Impact Statement, which would not be required if the Corps of Engineers were not involved, then the time for a permit can extend from 18 to 24 months. See Exhibit E for a comparison of permit processing times.

2. Lack of Decision Making Authority. The Corps of Engineers has an extremely complex and not entirely predictable method of decision making which involves many other Federal, State and local agencies. See Exhibit F. Under certain "memoranda of agreement," supposedly authorized by Section 404(q) of the Clean Water Act, the Corps has essentially given away control of both the substance and timing of its decision making to other agencies, agencies which in some cases would not otherwise have any responsibility for permit decisions on State lands. The Fish and Wildlife Service, for example, which is understandably concerned about the productive wildlife habitat existing between the Canning and Colville Rivers, makes extensive comments and imposes difficult stipulations upon oil and gas development on the North Slope. An existing Memorandum of Agreement between the Corps and the Fish and Wildlife Service, however, is probably unlawful, as the Clean Water Act insists upon the issuance of 404 permits within 90 days; the process provided in the Memorandum covers 270 days.

Other Federal, State and local agencies have similar authority in commenting to the Corps of Engineers regarding the full range of environmental impacts. Many of these agencies have no other statutory authority to make these kinds of serious permit stipulations, except through the Corps permitting process.

3. Cost. Because of the time and effort involved in processing Corps of Engineers permits, and the necessity of negotiating with agency personnel for the issuance of permits, extensive costs are incurred by the oil and gas industry in obtaining these permits. Not only have manpower needs for processing permits in Alaska risen drastically, but also other, larger costs are incurred by satisfying permit stipulations which are economically unproductive. Oftentimes, in fact, companies are required to accept onerous permit stipulations at the eleventh hour merely to have permits approved. In such cases as the Prudhoe Bay Waterflood Project, for example, permit stipulations with costs of tens of millions of dollars were accepted merely to allow this multi-billion dollar project to proceed in a timely manner. See the critical path chart for this project, and the impacts of the permit decision time on its success, which is attached as Exhibit G.

SPECIFIC SOHIO EXAMPLES OF REGULATORY DIFFICULTIES

Sohio Alaska Petroleum Company is a major operator on the North Slope of Alaska, and so has encountered significant regulatory delays and excessive permit stipulations in a number of instances. Some examples would be useful to identify:

1. Sag 7 and 8. These two gravel islands had been identified by Sohio for construction during the summer of 1980. Although permit applications were made nine months in advance of the date of proposed operation, these permits were delayed extensively because of the Corps permitting process and the inability of the various agencies commenting to the Corps to reach compatible conclusions on proposed permit stipulations.

4. General Permits. The Corps of Engineers has recently proposed a new scheme for the processing of "general permits" which will be tested this year. However, these general permits do not provide any automatic permit issuance, as the term might suggest, but instead require that a "pre-application process" be undertaken. In this process the applicant must obtain the full blessing of all agencies normally involved in the Corps permitting process. If any agency were to object to the proposed project, then the general permit is inapplicable, and the normal permit processing must be undertaken. Although this new procedure may simplify matters in the less complex and less controversial cases, it does nothing to assure the applicant that his proposed activities may not be subject to the burdens and delays of agency decision making encountered in previous years.

More vexing is the ineffectiveness of the existing Prudhoe Bay area general permit procedures in fast tracking special authorizations of routine projects which fall within their purview. Average processing times for requests for special authorizations for these projects has been in excess of 50 days, even though no objections have surfaced to any of the projects so covered. This sorry state of affairs can only highlight the need to reduce the broad coverage of the Section 404/10 Process in recognition of the very cumbersome processing mechanism which results from it.

2. Prudhoe Bay Waterflood Project. In conjunction with Arco Alaska, Inc. Sohio participated in an extensive permitting process attempting to obtain a Corps of Engineers permit for this multi-billion dollar development. After an Environmental Impact Statement was conducted over the entire project, which was required only because a Corps of Engineer permit was necessary for development of the project, the permit was issued at the very last minute before construction had to begin. Had the permit not been issued in such a time frame significant economic delays and the potential for diminished recovery of hydrocarbons from the Prudhoe Bay oil field could have resulted. The cost of obtaining the permit, however, was high. Added environmental stipulations were extensive, costing the companies tens of millions of dollars.

3. Kuparuk River Crossing. Although it might be suggested that permit delays are a thing of the past, a very recent Sohio pipeline bridge crossing application affords ready evidence to the contrary. The Kuparuk River Pipeline Bridge Crossing application process began with application submission in early October 1981. The permit was not issued until May 1982, some eight months later. Though the United States Coast Guard was engaged in its own Section 9 ((Rivers and Harbors Act of 1899) review of the proposal, the Corps of Engineers carried on a separate Section 404 review of the project, complete with attendant comments from interested Federal, State, and local agencies. The basis for such review was the use of approximately 200 cubic yards of fill slurry material placed around structural piles. The confusion and added administrative "juggling" burdened both government agencies and Sohio alike with no ensuing tangible benefits. Arguably, this had a great deal to do with the 8-month permit process which followed.

PROPOSED SOLUTION TO THE SECTION 404/10 PROCESS

In view of the significant disruption and delay that has resulted in the permitting of projects completed to date, and anticipated disruption and delay in the future, it is not an exaggeration to say that it could become impossible for new oil fields to be developed in the future in a reasonable time given the complexity of the planning process and the vulnerability of these planning processes to be significantly delayed by current Corps of Engineers permitting. As a result, Sohio has supported a dual approach toward regulatory and legislative reform of the current Section 404/10 Process.

A. Regulatory Reform

Beginning over one year ago, Sohio began on behalf of itself and with the American Petroleum Institute an intensive program of developing regulatory reform of Corps of Engineers permitting processes. This not only has resulted in the offering of extensive changes to pending regulations issued by the Corps of Engineers in 1980, but also has resulted in a recommended wholesale re-draft of these regulations in furtherance of a more streamlined and expeditious permitting process. Sohio has, in fact, developed a specific set of proposed regulations, provided herein as Exhibit H, which have been offered to the Corps of Engineers and other companies interested in regulatory reform.

We believe the following major factors should be accomplished through Corps of Engineer regulatory reform:

1. Simplify Procedures. Significant effort must be made to simplify and clarify the Corps' regulations to ease the administrative burdens on applicants and to avoid regulatory duplication.

2. Ninety-Day Permits. Procedures must be provided to ensure the issuance of substantially all permits within 90 days from the date of application, which is the requirement under the current law.

3. Memoranda of Agreement. The Memoranda of Agreement with other agencies must be completely replaced so that the Corps controls its own decisions, procedures and schedules. Referrals to Washington D.C. must be made discretionary with the Assistant Secretary of the Army and should be requested only by the heads of other agencies. Further, these requests should occur within the 90 day permit issuance period before the permit decision is made and should not constitute an administrative appeal from the decision of the District Engineer. Provisions relating to such Memoranda of Agreement must be placed in the regulations.

4. Jurisdiction. Jurisdiction of the Corps over uncertain areas must be clarified and a clear and direct nexus to navigation and interstate commerce provided. Definitions with jurisdictional impact must clearly establish the boundaries of the Corps' authority by utilization of geographic limits, clear scientific standards, and the like. An example is to change the term "wetlands", primarily a biological term, to "inundated lands", which would become a jurisdictional term.

5. General Permits. The use of general permits must be encouraged. Standards for both regional and nationwide permits should be supplied which provide for the consideration of mitigating measures under other regulatory programs to satisfy the requirements of Section 404(e) that general permits authorize discharges with only minimal

environmental effects. These provisions must provide a clear numerical threshold for similar activities to trigger general permit issuance. These provisions must also provide that activities are "similar in nature" and thus subject to general permits if their general environmental effects are similar, and not necessarily only if their use is similar. Special authorization procedures would be either eliminated or simplified to avoid delays in processing.

6. Permit Decision Criteria. The "public interest review" currently applied by the Corps of Engineers is vague and indefinite, and has little or no relation to statutory standards. It should be discarded, and clear and definite criteria substituted which directly satisfy statutory requirements. These criteria must include a procedure for adopting the environmental mitigation effected by other regulatory programs or governmental bodies so that duplication of regulatory effort is avoided.

7. Limit Permit Conditions. The subject matter of permit conditions must be limited to the direct and proximately caused effects of the discharge of dredged or fill material. Permit conditions should not be permitted which effect matters other than the placement of dredged and fill material; for instance, subsequently conducted activities on permitted fills like drilling for hydrocarbons should not be subject to permit conditions. This reform is basic to the proper administration of this regulatory program. Any other position undermines the basic Reagan Administration position on the narrowly appropriate breadth of bureaucratic regulatory programs which result from narrow authorizing statutes.

8. Inundated Lands Provisions. The administration of the Corps program over inundated lands must be given clear sideboards. Definitions must be supplied which give clear and independently verifiable limits to the program, and which make the overall scope of the program reasonable.

9. Alaska Wet Tundra. Special provisions must be provided which give a reasonable scope to the Corps of Engineer program in Alaska, and which realistically and appropriately regulates discreet areas of wet tundra adjacent to navigable waters, without incorporating the major areas of the State.

10. Corps and Other Federal Agency and State and Local Authorities. The Corps should administer its program in close consultation with other Federal agencies and local and State governments. However, it is disruptive of the appropriate relationship between the Corps and these other agencies and governments to require Corps conformance to their decisions. The Corps should limit its decisions to Corps generated criteria and policies.

11. Rewrite EPA Guidelines. The guidelines promulgated by the Environmental Protection Agency pursuant to Section 404(b)(1), found at 40 CFR Part 230, must be completely rewritten. The Section 404(c) regulations at 40 CFR Part 231 must be amended.

We are pleased to report that the Office of Management and Budget released on May 7, 1982, what has been recently referred to as the "OMB Charter" on Section 404/10 Reform, which listed a six point program for implementing extensive administrative reforms to the regulatory program of the Corps of

Engineers. Among other things, the OMB Charter takes a forthright position on the obligation of the Corps of Engineers to reduce uncertainty and delay in its permitting processes, give the States more authority and responsibility where State programs exist, reduce the conflict and overlap in policies between the Corps and other interested agencies, expand the use of general permits, clarify the scope of the permit program over wetland areas and generally review administrative reforms, including the Memoranda of Agreement now in existence. The OMB Charter document, which with its accompanying press release is attached hereto as Exhibit I, provides a significant basis under which the regulatory reform efforts urged by Sohio may begin. Many of the major provisions which we have sought to have corrected have been specifically identified by the OMB Charter, and we believe this is an important first step in streamlining Corps of Engineers permit processing. We at Sohio endorse the Charter, and intend to follow the implementation of the Charter closely to its completion.

B. Legislative Reform

Although the Presidential Task Force on regulatory relief has issued its program to reform the Corps of Engineers permitting regime, the complete goal of Sohio has not yet been reached. Unfortunately, Sohio's goal to substantially reduce the burdens and uncertainties that have beset the Section 404/10 Process without compromising environmental protections cannot be achieved by administrative and regulatory actions alone. Legislative refinements to Section 404 of the Clean Water Act are also necessary.

While the program does describe in general terms those reforms which are intended to be addressed, an assessment of these reforms including the very important jurisdictional questions cannot be made until the implementation process, including formal agency rule making procedures, has been completed and specific details of the reforms are available. Although implementation is presently scheduled to be completed by November, 1982, the effective date for such reforms may extend beyond November. In this regard, it is noted that the issuance of the reform program on May 7, 1982, occurred nine months after the Section 404/10 Process was identified by the Presidential Task Force on August 12, 1981, as a top priority for regulatory relief.

Even if the reform program is expansively implemented in a timely fashion, certain legislative refinements to Section 404 are necessary. By way of illustration, the following five examples have been identified as proposed changes:

1. The specification of any disposal site for any permit is governed by guidelines comparable to the ocean dumping criteria under Section 403(c), which explicitly pertains to the effects of "pollutants." These criteria are not appropriate as guidelines for deposition of gravel in wetland areas or "other waters of the United States", because gravel should not be regarded as a "pollutant".

2. In Section 404(b), a decision to prohibit specification of a site can only be reviewed on the basis of the site's economic impact on navigation and anchorage. Inclusion of the nation's energy interests as a basis for decision, or at least consideration of all economic impacts, are appropriate.

3. The specification of a disposal site in Section 404(c) provides that the location of a site may be prohibited on account of "unacceptable environmental effects" on municipal water supplies, shellfish beds and fishery areas, or wildlife or recreational areas. This very broad term is undefined in the statute and further clarification of it would add consistency and predictability to the permitting process.

4. In Section 404(e)(1), general permits may be issued only if the activities being permitted for a category of activities are "similar in nature" and if such activities, individually and cumulatively, "will cause only minimal adverse environmental effects." Moreover, the ocean dumping guidelines under Section 403(c) are likewise applicable to general permits. General permits are thus made applicable only to small, insignificant activities, and legislation should be implemented to expand the use of general permits beyond these narrow purposes.

5. In Section 404(e)(2), general permits may not exceed five years duration, and can be revoked or modified if the authorized activities have "an adverse impact on the environment." The very broad term of "adverse impact" seriously compromises the utility of general permits and the five-year limitation makes little sense. Both limitations should be relaxed to enhance the use of general permits.

Sohio believes that the Federal government should not be regulating State and private wetland areas in Alaska. The State of Alaska alone should regulate these areas if the State deems such regulation necessary and appropriate. This view evidently conforms to the overwhelming opinion of Alaskans, as indicated late last year in response to Senator Ted Stevens' questionnaire regarding various Alaska issues. Specifically, in response to Question 5 regarding the Section 404/10 Process, 31.6% of the 6,700 responding Alaskans reported that the Federal government should not be regulating privately owned wetlands, 50.5% preferred that the State of Alaska set and enforce such regulations, if there are to be regulations, and only 10.9% concluded that the Federal government should be regulating wetland areas whether or not the land is Federally owned, as is the case today. As a result, we believe legislative relief should also consider the specific elimination of extensive regulation over State and private wetland areas in Alaska, as the overwhelming opinion in Alaska supports. See Exhibit J.

Currently, there are several bills pending in the U.S. Congress which address Section 404 of the Clean Water Act. For example, S.777, introduced by Senators Tower and Bentsen is pending before the Senate Committee on Environment and Public Works on which Senator Murkowski serves as a member, and its companion bill, H.R. 3962, introduced by Congressman Hightower, is pending before the House Committee on Merchant Marine and Fisheries on which Congressman Don Young serves as a member. Both of these bills appear to be appropriate vehicles for responsible refinement of the Clean Water Act to enable the Corps of Engineers to most effectively achieve the Act's purpose — protecting the chemical, physical and biological integrity of the nation's navigable waters.

THE OPPOSITION TO REGULATORY AND LEGISLATIVE REFORM OF THE SECTION 404/10 PROCESS

The proposals by Sohio and other interested parties to streamline the Corps' regulatory process has encountered opposition from agencies and other parties now profiting from extensive Corps regulation and accompanying uncertainty and delay in the permitting process. For example, the State of Alaska has almost incredibly endorsed the continued extensive regulation of State wetlands by the Corps of Engineers. We believe that this State policy contains significant flaws, including the following:

1. The policy calls for continued Federal jurisdiction over all types of wetlands, including the Prudhoe Bay and Kuparuk oil fields, which are located on State lands. While there may be an argument for continuing Federal restrictions in navigable waterways, the State's policy should not call for continued Federal restrictions in State wet tundra areas.

2. The State, like any responsible permitting agency, should strongly support efforts by the Federal government to reduce the time involved in processing permits. This objective, while alluded to in previous policy statements, needs to be explicitly stated. It is important to note that the State itself has spent many years in attempting to implement regulatory relief on a statewide level, which has not yet been accepted. Sohio continues to be hopeful that meaningful regulatory relief on the State level also can be adopted promptly.

3. This State should recognize and clearly enunciate that the delay in processing permits not only results in great costs to private individuals and companies, but also to the State itself. Delays in oil and gas production revenues and increased costs of construction of capital

projects on net profit and royalty share State owned lands may result in significant reduction in revenues earned by the State in its oil and gas properties.

4. As suggested by the Corps of Engineers in its own public reports on this regulatory relief effort, the State should endorse the notion that existing State approval processes of activities on State owned lands should supplant the existing Section 404/10 Process if the goals of the wetlands program identified by Congress are being met by these State programs. The Corps would likely find that its concerns are being adequately responded to by State permitting agencies, and that the Corps program is therefore a duplication of effort. We believe the State should agree that such duplication of effort is inappropriate and unnecessary.

In addition to apparent concerns raised by State agencies, a joint statement recently issued by many of the major conservation organizations in the country have also responded negatively toward Vice President Bush's regulatory reform proposals announced through the OMB Charter. Although it can be well understood that the environmental community would oppose the streamlining and narrowing of 404 permitting, we believe that their objections are not well founded and are instead based on a misreading of Section 404 and the original purposes of that section law. Section 404 was not intended by Congress to establish an overriding environmental statute authorizing multi-level agency comments on every construction project on the North Slope of Alaska. It was instead intended by Congress as a less rigorous permit scheme to consider water quality impact of required dredge and fill activities occurring on or adjacent to navigable waters of the United States. It has turned into a broad environmental statute only because of misapplication of the regulations and misunderstanding of court decisions over the last seven years and particularly since the Corps made major jurisdictional changes on Alaska wet tundra in January of 1979. Regulatory and statutory relief from Section 404 would merely reclarify the original congressional intent by streamlining permit decisions, limiting the scope of review on those decisions, and obtaining timely permits in a narrowed area of jurisdiction. Furthermore, regulatory and statutory relief will give to the Corps of Engineers final decision making authority on its own permits which is simply not available to it under current regulations.

The Corps of Engineers is now the chief regulatory body in the most important energy development area in the United States, which we believe is both unnecessary and undesirable.

We conclude that the requirement of the preparation of Environmental Impact Statement for all lease sales on Federal lands, plus existing extensive State regulation of oil and gas activities on State lands, provides for adequate environmental safeguards without the Corps of Engineers process. Citizens of the State of Alaska are also in general agreement that the Federal government should not regulate wetland areas owned by the State government.

Therefore, expansive environmental review of industrial activity afforded by the current regulatory and legislative relief is required now to remove the burdens imposed upon the oil industry by the current Corps regulatory program.

1. Expanded jurisdiction over virtually all of the North Slope of Alaska and most other coastal areas of the State should be curtailed; otherwise ongoing exploration and development activities in the State will be severely hampered.

2. The "public interest review" and agency commenting process must be streamlined so that the Corps does not accept stipulations which go beyond the respective authorities of commenting agencies involved.

3. Regulatory Authority should be limited to water quality impact of the discharge of dredge and fill material on a particular site only, and should not adopt stipulations which control subsequent oil and gas operations occurring on such locations.

4. Extensive duplication of the Corps process with other regulatory schemes must be checked so that State environmental and land use controls remain paramount on State land.

5. Unnecessary and costly delay of oil and gas activities must be examined to ensure that the Corps process does not impede the achievement of national energy policy objectives.

In conclusion, the Section 404/10 permitting scheme continues to be a significant impediment to prompt and efficient oil and gas development on the North Slope of Alaska. Although it may be alleged that the problem has subsided, this may be true today only because there have not been recent oil and gas activities in frontier areas to challenge the Corps of Engineers permitting process. Once lease sales are held in the Diapir Field on the North Slope of Alaska and in the various areas scheduled for sale in Western Alaska, we can only anticipate a rebirth and continuation of the burdensome regulatory mechanism which has developed over the past several years. We submit that, if such a regulatory mechanism existed in the early years of the development of the Prudhoe Bay oil field, then that oil field would not have been developed as quickly or efficiently as it was and the national and State interests realized from its development would have suffered dramatically as a result.

EXHIBIT A

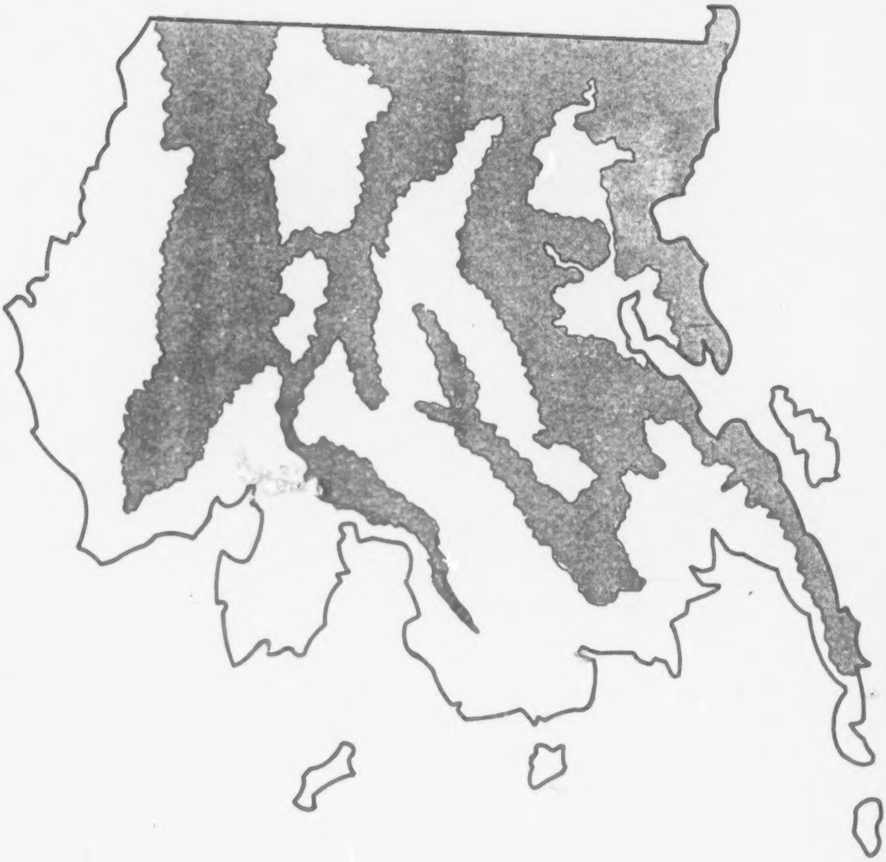


EXHIBIT B

PERCENTAGE OF AMERICAN OIL RESERVES

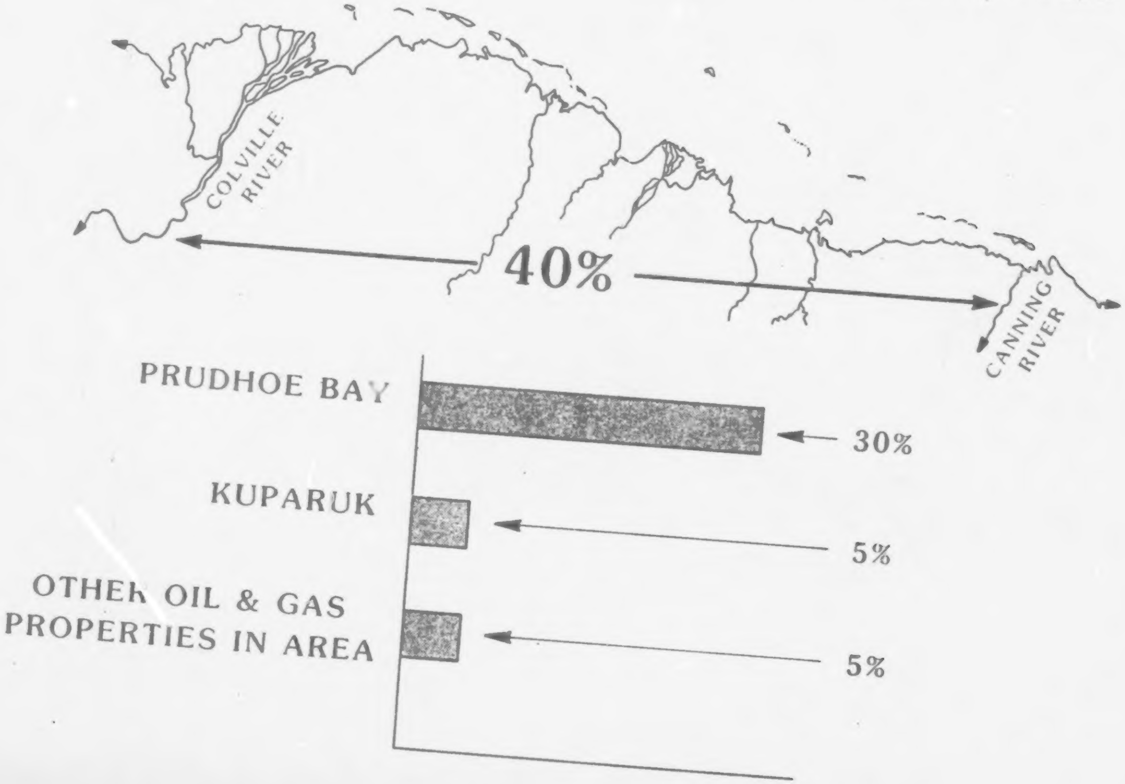


EXHIBIT C

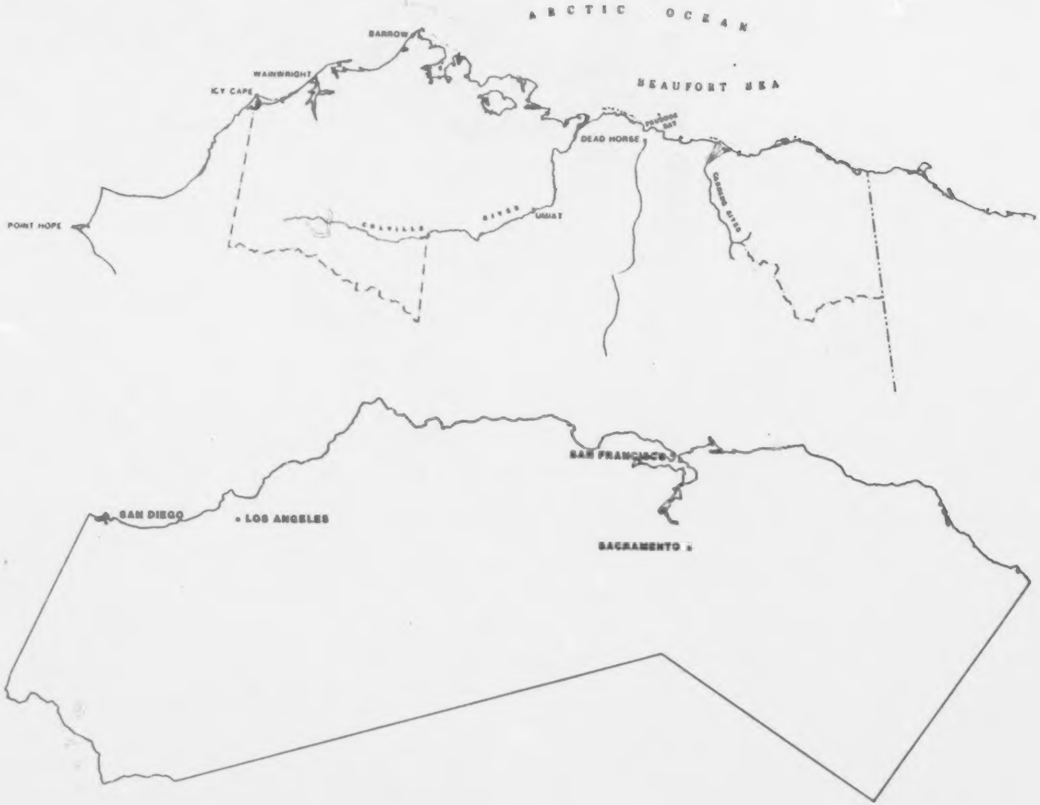

ARCTIC OCEAN
BEAUFORT SEA
BARROW
WAINWRIGHT
ICY CAPE
POINT HOPE
DEAD HORSE
PRUDHOE BAY
CANNING RIVER
COLVILLE RIVER
UMIAT
SAN FRANCISCO
SACRAMENTO
LOS ANGELES
SAN DIEGO

EXHIBIT D

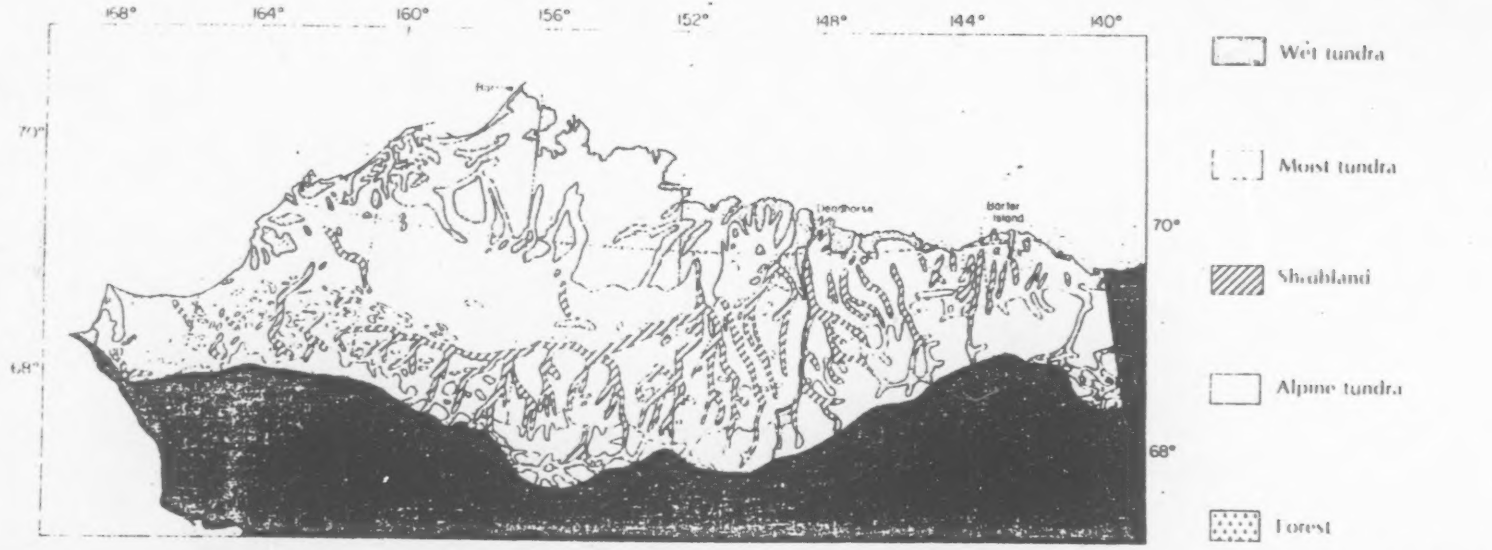

168°
164°
160°
156°
152°
148°
144°
140°
70°
68°
70°
68°
Barrow
Deadhorse
Barter Island
Wet tundra
Moist tundra
Shrubland
Alpine tundra
Forest
0 50 100 150
kilometers

Figure 50. Distribution of principal vegetation types of the Alaskan North Slope. Adapted from a map issued by the Joint Federal-State Land Use Planning Commission for Alaska (1973).

EXHIBIT E

PERMIT APPLICATION SCHEDULE

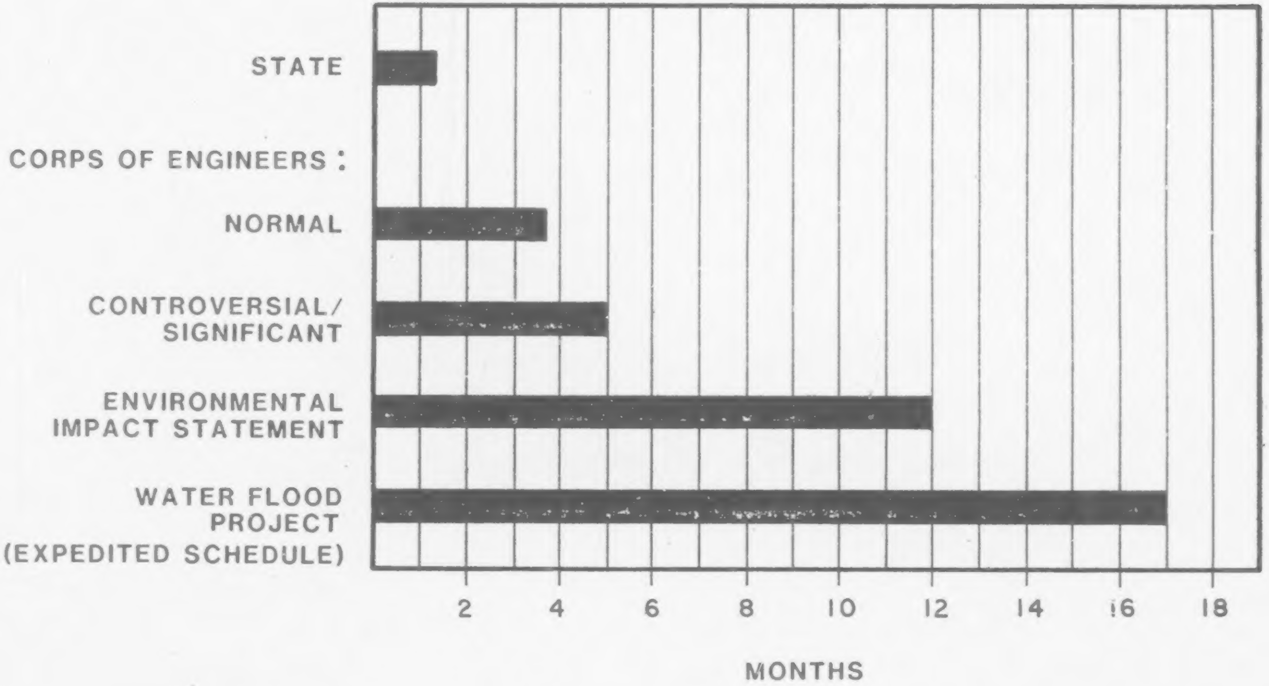


EXHIBIT F

OIL & GAS DRILLING OPERATIONS

STATE PLAN OF SURFACE OPERATIONS

DMEM
(ISSUING AGENCY REVIEWS WITH;)

ADF&G
ADEC
DFLWM
DPDP
OPERATIONAL INSPECTION
DOSH
DHSS

FEDERAL CORPS OF ENGINEERS WETLANDS CONSTRUCTION

COE
(ISSUING AGENCY REVIEWS WITH;)

USF&WS
NMFS
EPA
DPDP
NSB
PUBLIC NOTICE

CONSISTENCY DETERMINATION

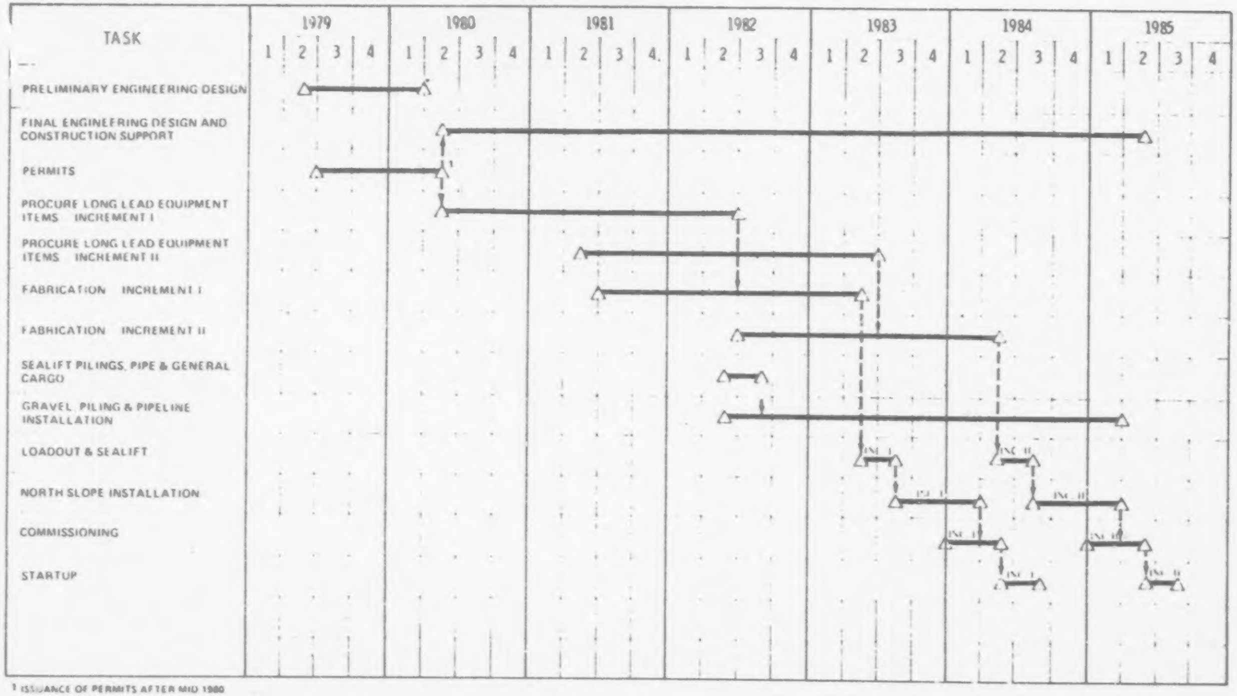
DPDP
ADF&G
ADEC
DNR

WATER QUALITY

ADEC

EXHIBIT G

PROJECT SCHEDULE
PRUDHOE BAY UNIT WATERFLOOD PROJECT



[1] ISSUANCE OF PERMITS AFTER MID 1980 MAY JEOPARDIZE A 1984 STARTUP

EXHIBIT H

SUMMARY OF AMENDMENTS TO
33 CFR 320 AND f.f.

I. INTRODUCTION.

The amendments proposed today are required to reflect a number of new statutes (primarily the 1977 Amendments to the Clean Water Act (CWA)), Executive Orders, judicial decisions and policy changes which have occurred since the current regulations were published on July 19, 1977. Additionally the Corps has various policy goals which are accomplished through these amendments; these goals are set forth specifically in the next section.

Public participation in this rule-making is encouraged.

Dates: Comments must be received on or before a date 30 days after publication. If the Corps decides to hold a public hearing or hearings, a 30-day advance notice will be published in the Federal Register.

Address: Comments should be submitted in writing to: Office of the Chief of Engineers, ATTN: DAEN-CWO-N, Washington, D.C. 20314. Comments will be available for examinations at the Office of the Chief of Engineers, Room 6235, Pulaski Building, 20 Massachusetts Avenue, N.W. Washington, D.C. 20314.

II. ACTION TAKEN BY THE CORPS OF ENGINEERS TODAY.

Today the Corps takes three major actions in order to improve its permit regulations:

A. The Secretary of the Army is today withdrawing the proposed 1980 Regulations because they perpetuate policies creating overburdensome regulatory procedures and lengthy time delays which undermine the national economic recovery and which unduly prejudice development of high priority national interests particularly in the area of energy development. The proposed 1980 Regulations provide for a level of environmental impacts mitigation through a burdensome and lengthy regulatory permitting system which can better be achieved through the simple regulatory system contemplated by the statutes, one which more directly applies environmental protections to activities permitted by the Corps. Certain portions of the proposed 1980 Regulations, such as the new Section 330 dealing with general permits, are incorporated into the amendments proposed here with modifications.

B. The Corps proposes substantial amendments to the 1977 regulations to clarify and simplify the program while preserving the environmental protections inherent in the regulatory programs administered by the Corps.

C. The Memoranda of Agreement and Memoranda of Understanding with other Departments of the Federal government are withdrawn today except those Memoranda of Agreement between the Secretary of the Army and a state pursuant to 40 CFR 123.99. New Memoranda will be issued pursuant to the procedures contained in these regulations.

III. GOALS OF THESE AMENDMENTS

A. Goals Enumerated.

In proposing these amendments today the Corps seeks to achieve the following goals:

1. Simplify the administrative burdens of the §404 program and make the application of the program reasonable.
2. Clarify jurisdiction under §404 and §10.
3. Provide and authorize innovative means of implementation to lead to reasonable application of §404 and §10.
4. Clarify permit issuance criteria.
5. Clarify appropriate roles of other local, state and federal agencies in the §404 program.
6. Withdraw and reissue memoranda of agreement under the strict §404(q) criteria.
7. Timely permit issuance within 90 days.

8. Clarify the application of the §404 program to wetlands.

9. Clarify the application of the §404 program to Alaska tundra areas.

10. Provide a reasonable level of review in the Outer Continental Shelf and in state submerged lands.

11. Limit the available scope of permit conditions to the actual effects of discharge and not subsequent activities.

12. Reduce the length of the regulations and clarify their procedural requirements.

B. Goals Discussed.

1. Simplify the Administrative Burdens of the §404 Program and Make Reasonable its Application.

The regulations proposed today are promulgated pursuant to Section 10 of the River and Harbor Act of 1899 (33 U.S.C. §403) and Section 404 of the Clean Water Act of 1977 (CWA; 33 U.S.C. §1344) originally enacted as part of the Federal Water Pollution Control Act of 1972 (FWPCA). Section 404 and Section 10 are quite simple in form and provide simple requirements. Under Section 10, the Corps of Engineers is authorized to issue permits for work in navigable waters which will obstruct navigable waters, and under Section 404 the Corps of Engineers is to issue permits for the disposal of dredged and fill materials in waters in the United States in a manner consistent with environmental guidelines prepared by the EPA.

The exhibits to Senator Muskie's October 4, 1972 explanation to the Senate of the Conference Report on Section 404 demonstrate that Congress intended to create a simple regulatory system.

> The conferees were uniquely aware of the process by which the dredge and fill permits are presently handled and did not wish to create a burdensome bureaucracy in light of the fact that a system to issue permits already existed.
>
> Senate Public Works Committee, 93rd Cong., 1st Sess., *A Legislative History of the Federal Water Pollution Control Act Amendments of 1972*, Congressional Research Service, Library of Congress, January, 1973 (Hereinafter cited as *FWPCA Legislative History*) at p. 177. (Emphasis added.)

However, this relatively simple statutory format has resulted in a complex bureaucratic mechanism. The amendments proposed today are designed to provide the simple regulatory system which was originally contemplated by these statutes.

Moreover, the COE must assume, as do the courts, that Congress intended the Section 404 program to be administered in a reasonable, flexible and efficient fashion. *See*, *e.g.*, the House conference report ("The Conferees . . . did not wish to create a burdensome bureaucracy . . . [D]isposal site restrictions shall be limited to narrowly defined areas....")

and the statements of Senator Ellender in initially proposing §404 to the Senate in FWPCA Legislative History, supra, at 1387 ("The strict adherence to the published standards would result in 90 percent of the ports and harbors in the United States being closed . . . This would create a catastrophical situation with respect to our foreign and domestic commerce . . . We all recognize the need to protect our environment, but it is also necessary that we maintain a healthy economy") and Senator Stennis in a colloquy supporting the approach of §404 against the strong objections of Senator Muskie, FWPCA Legislative History, supra, at p. 1390 ("We must have reasonable environmental protection and at the same time operate the economy of this country"). As discussed, infra., Senator Muskie initially proposed strictly regulating discharges of dredged or fill material under the inflexible National Pollution Discharge Elimination System (NPDES) program under §402. This inflexible approach was discarded in favor of the reasonable, flexible and efficient §404 program. This approach must be maintained in the regulations.

2. Clarify Jurisdiction under §404 and §10.

The amendments proposed today are intended to clarify the jurisdiction of the Corps under the dredge and fill permit program as follows:

(a) Geographic Jurisdiction. Problems have arisen in determining the geographic scope of jurisdiction under the Corps' regulatory program. The geographic jurisdiction of the §404 is clarified to be inclusive of "all waters of the United States" which have a nexus with navigation under the commerce clause of the constitution. The geographic jurisdiction of the dredge and fill program under section 10 is the navigable waters of the United States.

(b) Subject Matter Jurisdiction. The subject matter jurisdiction of the Corps' §404 permit program shall extend to the discharge of dredge and fill materials only and under §10, to work or structures placed in the navigable waters. These amendments clarify that the Corps' jurisdiction does not extend to activities conducted upon the fill once it is in place. Zabel v. Tabb, 430 F.2d 199, (Fifth Cir., 1970), cert. den., 401 U.S. 910 (1971), is not to the contrary. Zabel holds that the Secretary may consider the environmental as well as navigation impacts under §10 regulation. The regulations proposed for adoption today provide for the consideration of the environmental impacts of the regulated activity.

(c) Scope of Inquiry. The scope of review within Corps jurisdiction includes the review of effects on navigation, environmental and economic factors identified in the proposed regulations for §10 permits, and those identified in the EPA regulations at 40 CFR 230 for §404 permits.

3. Provide and Authorize Innovative Means of Implementation to Achieve Reasonable Application of §404 and §10.

(a) Expand the Role of General Permits. The amendments proposed for adoption today substantially expand the role of general permits for the §10 and §404 programs. One of the requirements for a class of activities to qualify for a general permit is that it have only minimal environmental impact. In determining that minimal environmental impacts will occur with reference to activities regulated thereby, reliance will be placed upon existing local, state, and Federal regulatory programs or requirements which substantially mitigate environmental impacts of such activities. This approach is analogous to that adopted by the D.C. Circuit Court of Appeals in Alabama Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1980) at 353 and 357, where the court required EPA to review air quality emissions *as actually mitigated*. Such existing programs or requirements which significantly mitigate environmental impacts of activities proposed for general permits include but are not limited to coastal zone management programs, state and local zoning and land use classifications, conditions placed upon activities on Federal, state and local leases, local state and federal regulatory programs, conditions upon general permits, etc. Moreover, specific guidelines are created to encourage the utilization of regional permits to ease regulatory burdens. For instance, any time five or more permits are issued for similar activities in one region, the regional engineer is directed to prepare a regional permit covering such activities.

Congress desires to minimize bureaucratic burdens on applicants in the issuance of permits under this Section. Executive Order 12044 directs Federal agencies to reduce regulatory burdens on the public wherever legally possible. The Corps believes that in order to implement these policies more extensive use of general permits is essential.

(b) Provide Exemptions from §404 Permits as Provided by Congress. These amendments provide for specific exemptions for certain activities such as mining roads and agricultural or silvicultural activities. These exemptions are specifically provided for in §404(f) of the Act, but have not been implemented by regulations in the five years since passage of the CWA. These amendments provide regulations under which exceptions will be implemented.

4. Clarify criteria for permit issuance.

One key goal of the amendments proposed today is to clarify the criteria for permit issuance. The Corps today abandons the "public interest review" under which permits are issued subject to the criteria that they be in the public interest. This criteria for issuance preceded §404, and does not reflect the statutory scheme that EPA guidelines issued pursuant to Section 404(b)(1) shall establish the criteria for the issuance of permits under Section 404. The public interest review perpetuated a permit issuance procedure well outside that provided by subsequent congressional enactment.

The public interest review was originally adopted December 18, 1968 at 33 CFR 209.120(d) (1968) with reference to the administration of the §10 program, under significantly different circumstances than exist today.

The amendments proposed today provide that the Corps will no longer conduct a review of factors not intended by §404(b) to be reviewed by the EPA guidelines. When application of the EPA guidelines will result in the prohibition of the specified disposal site, the Corps shall consider the economic and social impacts of such prohibition and will determine whether to grant the permit if such economic and social impacts outweigh those impacts which were the cause of the initial denial.

These criteria are consistent with the intent of Section 404(a) and (b) of the Clean Water Act. The amendments proposed today further provide that consideration shall be given to the economic as well as environmental impacts of a permit decision. The Congressional intent of the Section 404 program was to provide a strict and careful environmental control reasonably administered so as to avoid undue economic impact. As discussed below, it was argued during the Senate debate on the Water Pollution Control Act Amendments of 1972, that the discharge of dredged and fill material should be included under the NPDES program. In opposition, Senator Ellender argued that economic considerations were key to a reasonable dredge and fill disposal program, stating:

> "Perhaps the most significant effect of applying standards for the discharge of effluents as it relates to removing spoil material from one place in the waterway to another without the interjection of new pollutants is the effect these arbitrary and unsupported standards will have on the benefit to cost ratio of navigation projects. We all recognize the need to protect our environment, but it is also necessary that we maintain a healthy economy."
>
> FWPCA Legislative History, at p. 1380. (Emphasis added).

During that same Senate debate, Senator Stennis stated:

> "We have to have reasonable environmental protection and at the same time operate the economy of this country."

FWPCA Legislative History, at p. 1390.

The House Conference Committee Report on the Federal Water Pollution Control Act Amendments of 1972 indicates that the Committee also intended for economic factors to be considered.

> "In establishing criteria for dumping, the Administrator [of EPA] is required to consider economic factors and these in turn would be taken into account in the designation of sites recommended for discharging or prohibited sites or times for discharging.
>
> However, the Secretary upon certification that there is no economically feasible alternative reasonably available, will not be bound by the determination of the Administrator."

FWPCA Legislative History, at p. 816.

However, the clearest indication of this intent is that §404 permits are to be issued pursuant to guidelines promulgated by the EPA; the EPA guidelines are, under §404(b), to be "comparable to" those enumerated in §403(c). The §403(c) criteria include economic impacts as a matter of consideration in each permit. The amendments proposed today are necessary to ensure that the legislative intent of the Act is carried out. The Corps today adopts the policy that permit issuance decisions shall be made by the Corps on the basis of the EPA criteria promulgated under Section 404(b) as balanced against economic and social concerns provided for in this statute.

The provision of similarly simplified, clarified, and balanced permit issuance criteria for §9/10 permits is also proposed, and these new criteria are also stated in Part 320. This approach is not contrary to Zabel v. Tabb, supra, which endorsed the public interest review procedure. In doing so, Zabel v. Tabb, supra, endorsed the consideration of aquatic environmental effects of a proposed activity as well as navigation considerations, an approach which is retained. As well, Zabel v. Tabb, supra, endorsed the approach of receiving interagency comments, an approach retained in §320.5.

5. Clarify the Appropriate Roles of Other Local, State and Federal Agencies in the §404 Program.

As stated in Zabel v. Tabb, supra, at p. 211, "The District Engineer is given the initial responsibility of evaluating all relevant factors in reaching a decision as to whether the particular permit involved should be granted or denied . . . . in case of conflicting views the ultimate decision will be made by the Secretary of the Army . . . ." The amendments proposed today reemphasize that the Corps is the agency empowered by Congress to make the decision whether a permit should be granted or denied.

Interagency review and comment serves the important purposes of timely permit issuance and eliminating duplication of effort as provided in section 404(q) of the Act. The Corps policy will continue to emphasize this important role which other agencies may play within the Corps' program.

(a) Provision is made for comment from other local, state and federal agencies and such comments will be considered by the Corps if they are made in a timely manner and are within the jurisdictional scope of the Corps' permit program. The Corps will, however, determine in its discretion what weight should be given to these comments and will consider them only within the scope of its review criteria.

(b) Independent review of factors which are beyond the scope of the permit program review criteria will not be considered.

For instance, the Corps program is not intended by Congress to be a land use planning tool and the Corps will not promote policies which encourage its use as a land use planning tool.

The Corps program is intended to focus on the aquatic and navigational effects of regulated activities, and consideration of other factors may be declined.

The Corps will not be required to recognize any agency veto or mandated conditions except as provided by law, for instance the EPA veto of particular discharge sites provided for in section 404(c). Other such requests will be considered as comments and will be given weight appropriate to their relationship to the decision factors of the Corps program.

6. Withdraw and Reissue Memoranda of Agreement.

The existing memoranda of agreement and memoranda of understanding are withdrawn today because they perpetuate policies which are not consistent with their congressionally intended purposes as stated in section 404(q) of the statute discussed above.

The amendments today establish that it is the policy of the Corps of Engineers to conduct interagency consultation and review of §9, 10, 403 and 404 permits strictly as required by statute.

(a) General Policies Governing Interagency Consultation and Review. Except for consultation under §404, which is discussed in 320.5(b), insofar as requirements of consultation do exist in law (*See*, e.g. the Endangered Species Act (ESA), 16 U.S.C. §1531 *et seq*., and the Fish and Wildlife

Coordination Act (FWCA), 16 U.S.C. §§661-666(c)) then specific procedures with reference to these requirements are included in the Corps regulations so that the terms of such memoranda will be guided by lawfully promulgated and publicly available regulations. Such consultation will be conducted in a manner consistent with the principle that the Corps of Engineers shall make the final decision on a permit application and shall do so in a timely fashion. Further provisions are as follows:

(i) Purpose of interagency review is to aid timely review and ease administrative burdens on applicant. A statement is included that, consistent with the requirements of statutes requiring consultation applicable to COE programs, procedures have been carefully drafted to ensure an orderly and timely review leading to the issuance of a permit within 90 days of application and achievement of the purpose of easing the bureaucratic burdens on the applicant, and avoiding duplicative procedures such as multiple permit reviews or hearings. As discussed above, a strong statement is included that interagency comment and review is not conducted under Section 404(q) or other authority so that agencies not otherwise so authorized can assert authority over applicants or projects.

In this regard joint review procedures are provided in order to avoid the duplication of agency effort in such activities as fact finding, public hearings and investigations.

(ii) The District Engineer Makes the Decision. The COE District Engineer is the final decision maker. All such consultation is conducted at the District level -- no administrative appeals lie from the District Engineer's decision, and no interagency vetoes are created. The District Engineer shall have authority to accept or deny requests for stipulations or other comments made by any agency of the Federal, State or local governments, or members of the general public, without creation of substantive authority in any such agency or member of the general public, and without threat of significant delay due to agency appeal rights. This authority is subject to qualification only where a contrary result is mandated by federal law. Once the District Engineer issues a permit decision, that decision is the final agency action by the COE, and is unappealable.

(iii) No federal agency vetoes except as required by statute. No federal agency veto will be allowed, except specifically as required by Federal law in, *e.g.*, the Endangered Species Act, the Federal Coastal Zone Management Act, or in §401 or §404(c), of the CWA (*See* §320.5(b) below for discussion of §§401 and 404(c).)

(iv) No administrative appeal rights. No right to administrative appeal lies with any agency of State, local or Federal government, or with any member of the general public.

(v) "Referral up" in limited circumstances during the 90 day permit issuance period. In circumstances posing issues of national importance, a Federal agency may request one consultation at the Washington level before a permit is issued, which request shall be granted at the discretion of the Chief of Engineers. No such requests shall delay, stay, or otherwise affect the timely issuance of a permit within 90 days. The ultimate timely decision by the District Engineer on the permit or on any stipulation proposed thereunder may be guided by request of Washington COE authority as a result of such consultation.

(vi) Future Draft Memoranda Published for Public Comment in Federal Register. Memoranda of Agreement highly impact the rights and procedures available to applicants. Failure to publish such Memoranda as rule-making prejudices the rights of applicants and the public under the rule-making provision of the Administrative Procedure Act, 5 U.S.C. §553. Any interagency agreement affecting applicant rights or permit processing procedures is subject to publication and public comment.

(b) Memoranda of Understanding. Section 404(q) provides specific authorization for interagency agreements to speed and simplify permit processing under §404. In part, Section 404(q) memoranda implement consultation with the EPA provided under §404(c) and the Department of Interior provided under §404(m). However, Section 404(q) authority has been abused. Memoranda of Agreement and Memoranda of Understanding issued thereunder have been completed which are violative of the requirements of §404(q). They must be rewritten specifically to satisfy the general principles provided in these regulations and additionally §404(q)'s requirements that any such agreement be directed to "minimize, to the maximum extent practicable, duplication, needless paperwork, and delays" and to ensure "that, to the maximum extent practicable, a decision . . . for a permit . . . will be made not later than the 90th day after the date of notice for such application is published. . . ." This essentially requires that inter-agency consultation under §404(q) (including that under §§401, 404(c) and 404(m)) occur

(i) at the field level;

(ii) completely within the 90 day permit adjudication period; and

(iii) that no provision exist for lengthy delay and administrative appeal after the permit decision is made;

The amendments proposed today provide strict criteria for the issuance pursuant to the guidelines outlined above of new memoranda of agreement, memoranda of understanding, and other similar interagency agreements. The Corps today adopts the policy that all such memoranda shall comply with these criteria and will thereby serve the purposes intended by section 404(q), and cover §9/10 permits as well. The new memoranda drafted pursuant to these criteria shall be published in the Federal Register and public comment on their contents will be welcomed.

7. Shortening Time Frame for Permit Issuance to 90 Days.

The amendments proposed today shorten the time frame for permit issuance to ninety (90) days. Section 404(q), 404(m) and the legislative history discussed below strongly support the position that Congress intended for the permitting process to take a maximum of ninety (90) days. This intent has not been fulfilled. Today, five years after the passage of the 1977 amendments, permits still take 110 to 180 days to be issued, on the average. The amendments proposed today effectuate Congress' policy by providing for a ninety (90) day permit.

They further provide that the Corps shall issue a notice of incomplete application within 15 days of its receipt and that comments received after the 30 day public comment period need not be considered at the discretion of the District Engineer. This provision is intended to keep the public comment and interagency review process within the 90 day time frame, since this is where many of the delays occur.

In an effort to maintain the 90 day time period, other related times are shortened by these amendments.

8. Clarify application of §404 program to wetlands.

The statements of Congressional intent, discussed in the history of §404 below, indicate there is broad discretion given to the EPA and the Corps to implement the §404 Program in a reasonable manner. Particularly with respect to wetlands, the cases also support a more reasonable manner of discretionary implementation of this program.

> "It is quite obvious from this history that the terms 'waters of the United States' and

> 'wetlands' are not terms of pure science. They are not meant to be. 'Wetlands' is a jurisdictional term, the product of the legislative process of political pressure groups . . . . Thus, the wetlands definition does not answer a scientific need, it satisfies a practical, a social, a political need, the need to define the scope of Section 404 jurisdiction. It should be interpreted with this purpose in mind. The definition may be scientifically incorrect, but that should not affect its validity as a jurisdictional definition. A 'wetlands' is what Congress (as reflected by the regulations) says it is."
>
> Avoyelles Sportsmen's League, Inc., v. Alexander, 511 F.Supp. 278, 288 (W.D.LA. 1981).

These amendments clarify the criteria, limit the jurisdictional scope, and provide procedures for permit issuance in certain types of wetlands. In order to accomplish this, the Corps has determined that the term "wetland" should be abandoned in favor of the term "inundated land." This new term is used to distinguish the jurisdictional purpose of the term "inundated land" as it is used in these regulations from the scientifically defined term "wetland" in order to emphasize its practical, legal and policy content.

Inundated land determinations using the criteria of (1) soil types, (2) vegetation, and (3) hydrology will be required prior to Corps' regulation of an area.

- The requirement "inundated lands hydrology" has two parts -- inundation, and direct and proximate hydrological communication. Together, these concepts are central to the reasonable administration of the program over inundated lands, because they require an actual nexus between wet soils and "waters of the United States" before otherwise wet soils become "waters of the United States". This prevents merely saturated soil from coming within the Corps program absent these factors. These concepts supply technical grounds for the application of the Section 404 Program within its appropriate scope.

9. Clarify the Application of the §404 Program to Alaska tundra.

The Corp's policy until today required permits for gravel and fill on wet tundra anywhere in the North Slope of Alaska. These amendments shall provide for a supplemental definition of inundated lands to make it clear that Alaska wet tundra generally will not be regulated as inundated lands. Regulation by the Corps of wet tundra has significant impact on energy development within the United States since roughly forty percent (40%) of America's domestic energy reserves are found in a relatively small area of Arctic coastline on the North Slope of Alaska. These amendments will significantly reduce the portion of that area which is regulated as wet tundra. The

Corps shall continue to have discretion to determine that discrete areas of wet tundra require regulation as inundated land, but only if the district engineer decides that a specific area serves some typical inundated land function such as ground water recharge or shielding from flood or wave action.

These amendments are adopted primarily because Section 404 did not intend the type of pervasive regulation of wet tundra in Alaska which exists today. The Section 404 Program was not initially asserted over wet tundra in Alaska. However, as a result of a public notice issued by the district engineer, Alaska District, in January 1979, the Corps of Engineers has: (a) Regulated the disposal of gravel fill on wet tundra areas of the North Slope pursuant to Section 404 as though such lands were within the ambit of Section 404, and (b) excluded Section 404 jurisdiction over most moist and dry tundra areas. It is the opinion of the chief engineer that this "public notice" so substantially and unpredictably enlarged the scope of the Section 404 Program in Alaska that it constituted impermissible rulemaking in contravention of the Administrative Procedures Act (5 USC §553). The EPA and the COE have conducted a review of the regulatory policy with respect to wet tundra, in preparation for the proper issuance of these regulations governing such areas. As a result of this review, the provisions of Section 323.2(c)(2), as amended herein, in part affirm and in part reverse the prior policy of the COE. The Corps has concluded that in many instances Alaska tundra areas should not be treated as "waters of the United States" for the purposes of jurisdiction under Section 404. The following discussion provides a technical, legal, and practical explanation for this conclusion and the resulting regulatory changes.

(a) Technical Analysis. Alaska tundra areas have unique technical characteristics which distinguish them from other wetlands located primarily in the lower 48 states regulated under Section 404. These characteristics justify a modification of the application of the Section 404 program for the following reasons.

First, wet tundra areas comprise a huge contiguous geographic area of Alaska which was not the subject of consideration by Congress when Section 404 was originally enacted or when later amended. From a technical perspective, the tremendous size of the wet tundra areas significantly lowers their sensitivity to development, particularly at the low levels of development currently present in these remote areas of Alaska. Administration of the Section 404 program over tens of thousands of square miles of non-unique, remote and largely undeveloped lands poses technical problems quite unlike those involved in the protection of small, isolated, discrete riverine estuaries in the lower 48 states, which are subject to intense population and development pressures. It is not without significance that a permit is in many cases required for activities in tundra occurring as much as fifty miles from a navigable waterway or tributary thereof.

Second, wet tundra areas are subject to saturation only during a very short period of the year. The thaw on the North Slope occurs approximately May 15th. Freeze-up occurs as early as late September. During the remaining seven to eight months of the year, these lands are frozen solid. The short and intense biological activity of the summer thaw is thus in sharp contrast to a lengthy period during which these lands should clearly not be treated as inundated lands for purposes of the Section 404 program.

Third, generally speaking such areas are subject to saturation primarily because they are underlain by permafrost which prevents adequate drainage into the groundwater. Indeed, there is no groundwater in the normal sense. Wet tundra is subject to saturation not because of the normal circumstances creating inundated lands in the lower 48 states -- factors such as estuarine, tidal or river flooding action do not generally apply to tundra areas. Wet tundra areas are saturated because they are subject to snow melt and melt water runoff which does not drain as a result of being underlain by a substantial amount of permafrost. Permafrost is a permanently frozen soil condition caused by arctic weather, which in all seasons forms a solid subsoil barrier to drainage. On the North Slope soil conditions generally extend from a depth immediately below a shallow active zone of a few feet below the surface to a depth of several hundred feet. In many areas, permafrost conditions penetrate as deep as 2,500 feet below the surface. In other words, wet tundra is not dependent for its creation or saturation upon the same factors as are other inundated lands regulated under Section 404 -- upon some interaction with waters of the United States.

Fourth, because of their remoteness from bodies of water and their vast size, wet tundra areas are generally not in direct and proximate hydrologic communication with navigable waters.

Fifth, as a result of the unique origins of wet tundra, functions of a hydrologic nature served by the inundated lands areas of the lower 48 states, such as protection from flooding, or wave action, groundwater recharge, and water filtration, are accomplished by wet tundra in very limited areas. These and other functions of inundated lands were listed in former 40 CFR Part 230.4-1 (a)(1), which contained the EPA's compilation pursuant to section 404(b)(1) of guidelines for the application of the Section 404 program to, inter alia, inundated lands and were incorporated in the formal COE regulations at 33 C.F.R. 320.4(b)(2). Wet tundra areas generally do not satisfy these functions without the presence of additional environmental factors. These factors are described in Part 323.2(c)(2).

Sixth, in spite of these critical differences in origin and function between vast areas of Alaska wet tundra and lower 48 inundated lands properly regulated under Section 404, some Alaska tundra areas serve during the short summer as a productive habitat for migratory waterfowl, and all through the year as habitat for a great many local species. These habitat values are worthy of protection. One of the primary impacts of the assertion of Corps' jurisdiction over Alaska tundra, particularly where such tundra is the property of the State, is the subjection of such land to significant Federal wildlife management authority under the Fish and Wildlife Coordination Act. However, the Corps is also aware of the keen interest expressed by Congress and the State of Alaska in maintaining Alaska State management of the wildlife resources of Alaska on both State and Federal lands. This interest was most recently expressed in §805(d) of the Alaska National Interest Lands

Conservation Act, Act of December 2, 1980, P.L. 96-987 (94 Stat. 23710, 16 USC §3115(d)) and the §404 program will not be used administratively to upset this carefully balanced legislative scheme by mandating federal control of wildlife on tundra except where narrowly appropriate.

Thus, utilizing the broad discretion available to the EPA and the COE in determining matters within their areas of agency expertise and in reasonably administering the Section 404 program over unique areas, the proposed regulations strike a balanced approach. On the one hand, they recognize the lack of need to regulate vast areas of Alaska wet tundra which are significantly different in origin and function from typical inundated lands; on the other hand, they reflect the critical need to protect the quality of water in those tundra areas which serve traditional inundated lands functions on a sustained basis.

(b) Legal Analysis. While the determinations made herein are generally based on a technical analysis, an evaluation of the proposed language included in new Section 323.2(c)(2) should also consider the legal background of the Section 404 regulatory program.

The legal history, and particularly, the legislative history of §404 is key to understanding the changes proposed today applicable to Alaskan tundra. This history is discussed in detail, below. However, even reference to the terms of the statute make clear its limited scope. The use by Congress in §404 of the terms "navigable waters", "waters of the United States, including the territorial seas", "disposal sites", and "impact . . . on navigation and anchorage" suggest a program with its primary focus on areas distinctly different than the tundra areas of the North Slope of Alaska.

The proposed amendments to Section 323.2(2) establish a complex but definite mechanism for determining whether certain unique tundra lands in the State of Alaska should be treated as "inundated lands" for Section 404 purposes. Given the unique technical factors which distinguish these Alaska land areas, this is clearly a matter within the discretion of the COE, whose responsibilities under §404 include making determinations of this sort.

Section 323.2(c)(2) accomplishes an adjustment in the Section 404 program based on experience and knowledge obtained in administering the Section 404 program in Alaska and elsewhere. There have been, and no doubt will be, other adjustments in the application of the program which will render it both more definite and more reasonable in application.

(c) Practical Analysis. Asserting Section 404 jurisdiction over vast areas of Alaska wet tundra would lead inevitably to unintended results. If "waters of the United States" is defined so as to require regulation of Alaska wet tundra, with its unique distinguishing characteristics, then there would be virtually no limit to the regulatory jurisdiction of the COE. Theoretically the COE could even be required to regulate activities such as a child mixing a bucket of water and a bucket of sand. As discussed below, Congress clearly meant, under Section 402, that the water in the bucket be unpolluted, but just as clearly did not intend Section 404 coverage when it is mixed with a bucket of sand. It is one of the COE's responsibilities to construct definitions which draw a realistic line between those activities which must be regulated in order to achieve the water quality goals mandated by Congress, and those activities which manifestly need not be regulated in order to achieve these goals. Providing mechanisms such as in Section 323.2(c)(2) to eliminate certain unique tundra areas, which serve no valuable hydrologic functions from the coverage of Section 404 is a reasonable means of ensuring that the COE uses its limited resources efficiently to carry out its responsibilities under Section

404. Finally, while not determinative in defining the scope of the COE's jurisdiction, the State of Alaska has long administered a regulatory program governing the use of State lands, which is applicable to wet tundra areas, and thus it will continue to protect wet tundra areas from any unusual environmental impacts.

In those areas where Alaska tundra is still subject to Corps regulation pursuant to these amendments, regional permits will be considered for dredged and fill material discharge activities. The activities conducted in the tundra areas of Alaska tend to be similar in nature and environmental impact; regional permits would help to avoid duplication of state procedures and various Federal procedures which already regulate these activities. The Corps encourages comments on the issuance of such a regional permit.

10. Provide a reasonable level of review on the Outer Continental Shelf and in the State waters.

With these amendments, the Corps also adopts special procedures for offshore oil and gas structures in state and Federal waters. Special policies are provided to clarify that structures on the outer continental shelf (OCS) and in state waters are subject to favorable treatment which limits the review of such structures to their effects on navigation and national security. With reference to the OCS, §4(e) of the Outer Continental Shelf Lands Act (OCSLA; 43 U.S.C. §1333(e)) extends Corps of Engineers jurisdiction to the OCS for the limited purpose of preventing obstructions to navigation.

These special policies are provided because the BLM and in some cases various state agencies have considered all other factors of public interest in their decision process on whether or not to grant OCS leases. The Corps will continue to review the environmental review process of various state agencies and where it finds that activities on state lands are adequately regulated, it will limit its review appropriately.

Under these circumstances, the Corps believes limiting consideration to those factors is not only proper but all that is lawfully required. Where the Corps has determined through a review of applications that these activities are already sufficiently regulated so that the Corps need only review the effects of such structures on navigation and national security, its review will be so limited.

11. Limit the Available Scope of Permit Conditions to the Actual Effects of Discharge and not to Subsequent Activities.

The Corps of Engineers' statutory authorization is to regulate, pursuant to §404, the discharge of dredge and fill materials, and pursuant to §§9 and 10, activities impacting upon navigation and commerce. It is the stated policy of the Corps to regulate under these programs those specific activities, and not to engage in a broad and far reaching economic, environmental or technical regulation of activities that are conducted upon permitted structures, where such activities themselves to not involve the discharge of dredged or fill material.

These amendments emphasize that the Corps will not use permit conditions to regulate activities beyond the actual disposal of the dredge or fill material. In other words, the Corps will not regulate the activities conducted on the fill site after the fill is in place. Virtually all activities conducted upon regulated fills which have environmental impacts in themselves are regulated by other federal, state and/or local regulatory programs. Some such activities, e.g., §402 regulated NPDES discharges, were expressly intended by Congress to be exempted from §404 procedures. Other activities, e.g., commercial, industrial and resource extractive activities, are extensively regulated by other agencies and such matters are outside the expertise of the Corps. Congress has, in its wisdom, supplied other federal agencies with the authority to regulate such activities. Moreover, it is disruptive of appropriate federal/state/local government relations for the Corps to attempt to assert control over activities regulated more properly by other entities.

12. Reduce the Length of the Regulations and Clarify the Procedural Requirements.

The Corps is proposing other minor changes throughout these regulations which are designed to clarify procedural requirements or reduce the length of the regulations by eliminating duplicated material. These revisions include deletion of general and duplicative discussion, and additions such as more specific criteria for public hearings and notices, and procedures for requesting additional information from the applicant in writing.

The Corps feels that these amendments will further the goals of reducing administrative burdens and creating a predictable time frame for permit issuance.

C. Corps' discretion to achieve these goals.

The discretion which is vested in the Corps to achieve these goals is very broad. See, e.g., NRDC, Inc. v. Costle, 586 F.2d 1369, (D.C. Cir. 1977), at 1377-1383, where the court discusses, and in fact actively endorses the use of the broad realm of discretion available to an agency in effectuating a reasonable application of a regulatory program under the Clean Water Act. See also, Alabama Power Co. v. Costle, supra, at 357-361, where the court discusses extensive administrative discretion available to EPA to exempt the application of its Clean Air Act program, discussing inter alía, administrative necessity, situations involving de minimis impacts, and prosecutorial discretion in individual cases where the impacts do not rise to a significant level.

The court stated:

> The ability, which is described here, to exempt de minimis situations from a statutory command is not an ability to depart from the statute, but rather a tool to be used in implementing the legislative design. Id. at 360.

(See further discussion below with reference to this subject in section entitled "Litigation Over Scope of Program.") In this respect, it should be noted that the courts grant great deference to the constructon of a statute by the agency which is charged with its administration. Udall v. Tallman, 380 U.S. 1 at 16, 90 S.Ct. 792, 13 L.Ed. 2d 616 (1965); Zubel v. Allen, 392 U.S.168 at 192, 90 S.Ct. 314, 24 L.Ed. 2d 345 (1969); NRDC v. Train, 510 F.2d 692 at 706 (D.C. Cir. 1975).

IV. Brief Legal Analysis of the History of the Section 10/Section 404 Program.

In order to understand both the history of the Corps regulatory program and the appropriate level of discretion to be exercised in its administration, the legal background of Section 404 is reviewed here.

A. The Statutes.

1. Section 10 of the River and Harbor Act of 1899, Act of March 3, 1899 (30 Stat. 1151, as amended; 33 U.S.C. §403).

(a) Section 10 states in relevant part:

> The creation of any obstruction to the navigable capacity of any of the waters of the United States is prohibited . . . unless the work has been . . . authorized by the Secretary of the Army prior to beginning the same.

(b) Section 10 traditionally has been the basis for regulation of the navigable waters of the United States. Under this enactment, the Corps of Engineers has regulated dredging, filling, construction, and deposition and discharge of waste materials in navigable waters. Section 9 (33 U.S.C. §401) also regulates dredged and fill material insofar as bridges, causeways, dams and dikes are involved. (References herein to Section 10 include §9.)

(c) The application of §10 was traditionally limited to regulating obstructions placed in navigable waters. However, during the late 1960's, in the absence of other more specific enactments, §10 of the River and Harbor Act became the initial vehicle for the application by the Federal government and the Federal courts of necessary Federal water quality standards. See, e.g., Zabel v. Tabb, supra. While none of these cases has been overturned, since the enactment in 1972 of the Federal Water Pollution Control Act (FWPCA) (now known as the Clean Water Act (CWA)) Section 10 is again largely applied in regulating the effects upon navigation of various structures placed in the navigable waters.

2. Section 404 of the Clean Water Act (CWA), (33 U.S.C. §1344).

(a) Section 404(a) states:

> The Secretary may issue permits after notice and opportunity for public hearings for the discharge of dredged and fill material into the navigable waters at specified disposal sites. . .(emphasis added).

(b) Section 502(7)(33 U.S.C. §1362(7)) defines the key term "navigable waters" as "waters of the United States, including the territorial seas". This term is not defined further in the CWA; however, in the Conference Report accompanying the FWPCA stated:

> - The conferees fully intend that the term "navigable waters" be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.
>
> FWPCA Legislative History, at p. 327.

This statement concerning agency discretion leaves the final definition and case-by-case application of this term to the exercise of agency discretion in implementing regulations.

(c) Section 404(b)(1) provides that the EPA shall issue guidelines for the specification of disposal sites; if these guidelines alone would result in the prohibition of a disposal site, Section 404(b)(2) provides that the COE may additionally consider "the economic impact of the site on navigation and anchorage".

(d) Section 404(c) allows the EPA to veto disposal sites if unacceptable adverse impacts will result.

B. Legislative history of Section 404 and Section 502(7).

1. FWPCA. The Federal Water Pollution Control Act Amendments of 1972 (FWPCA), which originally enacted Section 404 and 502(7), was a Conference bill -- the House and the Senate passed different versions of the FWPCA and the

differences were papered over in Conference. As discussed above, §404 extends to "navigable waters", the Senate version's term, which is defined in §502(7) as "waters of the United States", the House version's term. The 1972 Conference Report quoted above contains only a sketchy description of the matter discussed herein -- the proposed scope of the Section 404 program. The Conference Report only establishes that the scope is to be broad without providing specific guidelines for its application. Moreover, these vague references were subject to subsequent, pre-passage clarification in the statements of conferees to the Senate and House explaining the Conference Bill and Report. As a result, the legislative history of the phrases "navigable waters" and "waters of the United States" as they apply to Section 404 is complex and incomplete, and at times contradictory. It might fairly be said that Congress' intent to have a program of broad application was clear, but its intent with respect to the applicability of the Section 404 program to specific types of waters was highly uncertain. (See references cited below.)

2. Origin of Section 404. Section 404 was essentially an afterthought in Congress' consideration of the FWPCA -- it was a creation of the Conference to "paper over" differences between the versions of the bill considered by the House and the Senate. (For excellent and detailed analyses of

the legislative history of the FWPCA, see Myhrum, "Federal Protection of Wetlands Through Legal Process", 7 Boston College Envt'l. Aff. L. Rev. 567 (1979); Ablard and O'Neill, "Wetland Protection and Section 404 of the Federal Water Pollution Control Act Amendments of 1972: a Corps of Engineers Renaissance," 1 Vermont L. Rev. 51 (1976); "Wetlands Protection under the Corps of Engineers New Dredge and Fill Jurisdiction," 28 Hastings L. J. 223 (1976); Schlauch and Strickland, "Changing Land to Water -- The Alchemy of the Federal Wetlands Regulatory Scheme," 27 Rocky Mt. Min. L. Inst. 635 (1981).

(a) Disposals of dredged material and "point source" regulations. One basic problem in the initial legislative proposals was that the coverage of Section 402, which creates the NPDES program governing "point source" discharges, overlapped with the traditional Corps of Engineers River and Harbor Act Section 10 jurisdiction. Under previous versions of the bill, a Section 10 discharge would also require a Section 402 NPDES permit. In order to resolve this problem, Senator Ellender proposed that the Senate version of the FWPCA (S. 2770, 92nd Congress) contain a Section 404 providing for EPA oversight in a form much like that eventually adopted, which would provide an NPDES exemption. Senator Ellender stated during Senate debate on S.2770, November 2, 1971 the following rationale for excluding the discharge of dredged material from the NPDES program:

> One of the main deficiencies in this bill is that it treated dredged material the same as industrial waste . . . The disposal of dredged material does not involve the introduction of new pollutants; it merely moves the material from one location to another. If polluted discharges from municipal and industrial sources are controlled as required by this bill, the disposal of dredged material in open water presents no significant problem.
>
> FWPCA Legislative History, at p. 1386.

In response, Senator Muskie proposed a Section 402(m) providing for favorable NPDES treatment for dredged spoil disposal. FWPCA Legislative History, at 1392. Senator Muskie's proposal to keep dredged spoil disposal within the Section 402 NPDES program was first adopted by the Senate, but was later rebuffed in Conference; the Ellender amendment's approach of permitting such disposals under Section 404 using EPA scrutiny was adopted in Conference.

Exhibits to Senator Muskie's October 4, 1972 explanation to the Senate of the Conference Report further clarifies the Congressional purpose with respect to Section 404:

> The Conferees were uniquely aware of the process by which the dredge and fill permits are presently handled and did not wish to create a burdensome bureaucracy in light of the fact that a system to issue permits already existed. At the same time, the Committee did not believe that there could be any justification for permitting the Secretary of the Army to make determinations as to the environmental implications of either

> the site to be selected or the specific spoil to be disposed of in a site. Thus, the Conferees agreed that the Administrator of EPA should have the veto over the selection of the site for dredged spoil disposal and over any specific spoil to be disposed of in any selected site.
>
> _FWPCA Legislative History_, at p. 177.

(b) _Disposal of Dredged Spoil vs. Fill Material_. In spite of the expansive reading Section 404 has been given, it appears that Congress had quite modest concerns in creating the program. The Congressional concern with meshing Section 402 and Section 10 was directed specifically at exempting from NPDES regulation the discharge of "dredged spoil", a very limited category of discharge resulting from, _e.g._, harbor dredging activities, which probably would occur only in navigable waters. _See_, _e.g._, _FWPCA Legislative History_, at 167, 1386 and _f.f._; 1972 USCC & AN at 3819. Recalling the original intent of Congress of 1972, Senator Muskie stated in 1976:

> Section 404 [was] designed to require the [C]orps, because of their existing authority to maintain navigation, _to regulate the dumping of polluted dredge spoil at specific disposal sites, the EPA having veto power over the selection of sites. That was the intent precisely and specifically stated._
>
> Section 404 was an exception to an otherwise comprehensive regulatory program embodied in Section 402. But implementation of Section 404 has not led to the elimination of open water dredge spoil discharge, which was the specific objective of Section 404.
>
> _Section 404 of the Federal Water Pollution Control Act Amendments of 1972; Hearings Before_

> Senate Comm. on Public Works, 94th Cong., 2nd Sess. 2 (1976) quoted in 7 B.C. Env. L. Rev., at p. 593, n. 126. (emphasis added.)

However, the final Conference version regulated the discharge of both dredged and fill materials without any official explanation being offered in the Report. In explaining the Conference changes to the Senate, Senator Muskie presented an exhaustive written discussion of the Conference Report. In the part of this discussion appearing at FWPCA Legislative History, p. 177 and quoted above, Senator Muskie discussed "dredged spoil" and "fill" as though the terms were interchangeable.

It appears that the discharge of "fill material" was included in the final version of the FWPCA only because certain dredged spoil disposal sites were contained within dikes, and the dredged spoil thereby became fill which otherwise would have been exempt from regulation. See: FWPCA Legislative History, supra, p. 1386 ("[The FWPCA] extends the authority of the Corps to construct similar diked disposal areas in other parts of the country where found necessary."). Senator Muskie, in 1976, explained the addition of the word "fill":

> The only reason we added the word fill was to make it clear that if the specific disposal site agreed upon by the [Army Corps of] [E]ngineers and EPA happened to be on land thus taking the form of fill, that there would be no ambiguity on the question of whether or not it also was covered by Section 404. Hearings, at 62.

See: 7 B.C. Env. L. R., supra, at 593, n. 127. In summary, the legislative history only supports a limited subject matter application of the Section 404 program.

(c) Application of Section 404 to "Waters of the United States". This limited subject matter of Section 404 in turn arguably limits the appropriate geographic extent of the program. Congress was concerned with exempting from the application of the Section 402 NPDES program the discharge of dredged spoil resulting from activities in navigable waters. Neither the House nor the Senate enunciated an intent to create a Section 402 - like program of broad geographic application relating to Section 404 discharges. In fact, quite the contrary is the case. The above-referenced discussion clearly shows a focus on dredging activities in navigable waters, primarily harbors. Moreover, Senator Muskie, in explaining the Conference Report changes to the Senate prior to the vote on their acceptance, specifically linked the Act's coverage to traditionally navigable waters. This discussion is especially relevant to a consideration of the appropriate scope of Section 404. Senator Muskie stated as follows, FWPCA Legislative History, supra, at 178:

> It is intended that the term "navigable waters" include all water bodies, such as lakes, streams, and rivers regarded as public navigable water in law which are navigable in fact. It is further intended that such waters shall be considered navigable in fact when they form, in their

> ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highway or railroads, a continuing highway over which commerce is or may be carried with other States or with foreign countries in the customary means of trade and travel in which commerce is conducted today. In such cases the commerce on such waters would have a substantial economic effect on interstate commerce.

The only other discussion of this provision before Congress was by Congressman Dingell, who in statements explaining the Conference Bill and Report to the House, demonstrated a similarly limited congressional understanding of the reach of §502(7):

> " . . . the conference bill defines the term "navigable waters" broadly for water quality purposes. [502(7)] It means all "the waters of the United States" in a geographical sense. It does not mean "navigable waters of the United States" in the technical sense as we sometimes see in some laws.
>
> The new and broader definition is in line with more recent judicial opinions which have substantially expanded that limited view of navigability--derived from the Daniel Ball case (77 U.S. 557, 563)--to include waterways which would be "susceptible of being used * * * with reasonable improvements," as well as those waterways which include sections presently obstructed by falls, rapids, sand bars, currents, floating debris, et cetera.
>
> The U.S. Constitution contains no mention of navigable waters. The authority of Congress over navigable waters is based on the Constitution's grant to Congress of "Power * * * To regulate commerce with Foreign Nations and among the several States * * *" (Art. I, sec. 8, Clause 3). Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). Although most interstate commerce 150 years ago was accomplished on waterways, there is no requirement in the Constitution that the

> waterway must cross a State boundary in order to be within the interstate commerce power of the Federal Government. Rather, it is enough that the waterway serves as a link in the chain of commerce among the States as it flows in the various channels of transportation--highways, railroads, air traffic, radio and postal communication, waterways, et cetera. The "gist of the Federal test" is the waterway's use "as a highway" not whether it is "part of a navigable interstate or international commercial highway." Utah v. United States, 403 U.S. 9, 11 (1971); U.S. v. Underwood, 4 ERC 1305, 1309 (D.C., Md., (*sic*.) Fla., Tampa Div., June 8, 1972).
>
> Thus, this new definition clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill

FWPCA Legislative History, at p. 250 (emphasis added). Thus, the two chief spokesmen on the bill which became the FWPCA, in key and uncontroverted statements to their respective houses of Congress, which occurred after the Conference Report was issued but prior to passage, agree that Section 404's application is intended to be limited to waters directly impacted by navigation. The clear upshot of this precisely stated legislative history is that §404 does not reach everything that is wet -- rather a clear nexus with navigation is required.

(d) *Purpose of Section 402*. This modest intent with respect to both the appropriate geographic and subject matter application of Section 404 stands in vivid contrast to the broad expression of Congressional purpose in preventing pollution of "waters of the United States" through the National Pollution Discharge Elimination System (NPDES) established in Section 402, and through other provisions of the FWPCA. Representative Jones stated, FWPCA Legislative History, supra, at 230:

> The objective of this legislation is to restore and preserve for the future the integrity of our Nation's waters . . .
>
> The conference report declares that it is the national policy to control the discharge of toxic pollutants; to provide Federal financial assistance for the construction of publicly owned waste treatment plants and sewage collection systems in existing communities that are an integral part of the treatment process; to develop and implement areawide waste treatment management planning processes; to foster a major research and demonstration program in the field of water pollution control; and to protect and preserve the primary responsibilities and rights of the separate States in our national antipollution effort.
>
> Each of these national policies is implemented in substantive sections of the bill.

This concern led not only to such broad statements of the policies to be applied, but also to an expansive geographic view of the waters to be affected by the program -- essentially all "waters of the United States."

(e) Summary of Legislative Intent. In sum, Congress enunciated a strong national policy with respect to the NPDES program. However, the legislative history evidences a far different approach to Section 404 -- it originated out of a concern to exempt dredged spoil disposal from point source discharge requirements of Section 402. Section 404 was expanded to cover the discharge of "fill material" only in order to insure coverage of a certain limited category of dredged spoil discharge, and its use of the term "navigable waters" as defined under Section 502(7) seems almost incidental. Because Congress had significantly different reasons for enacting Section 402 and Section 404, a substantial ambiguity exists as to whether "waters of the United States" should be broadly defined for purposes of the Section 404 program.

In any event, Congress chose not to define the key phrase "waters of the United States" either with respect to Section 402 or Section 404, but rather left this task to the agencies charged with the administration of the Section 402 and Section 404 programs. The exercise of agency discretion is clearly appropriate in this context to resolve ambiguities and to construct definitions which result in a program consistent with the express provisions of the statute, and which carry out the goals of the statute in a reasonable and efficient fashion.

C. Litigation Over Scope of Program. The above-referenced ambiguities in the legislative history of the FWPCA could be (and were) construed by some to require individual permits to be obtained covering a broad spectrum of activities (including plowing and irrigating fields, rice harvesting, forestry, etc.) in or near any water. This obviously was an unreasonable construction of the program. In the first attempt to rationalize the scope of the program, the Corps of Engineers chose in its 1973 Regulations not to assert jurisdiction under Section 404 over any but traditionally navigable waters, a construction which was contrary to the terms of the Conference Report language interpreting §502(7). This policy was challenged and resulted in the decision in NRDC v. Callaway, 392 F. Supp. 685 (D.D.C. 1975). The Callaway decision addressed one question -- does Section 404 apply only to traditionally navigable waters? Callaway held that the scope of the Section 404 regulatory program must go beyond traditionally navigable waters to the "waters of the United States." The current regulations of the COE, which broadly define the phrase "waters of the United States", are the result of that decision. However, it is important to note what Callaway did and did not do. Callaway only established that the scope of the §404 program goes beyond navigable waters. It did not attempt to define the final scope of the program, and, significantly, nothing in the Callaway decision precludes the COE from exercising its discretion to define "waters of the United States" in a manner based on its analysis and review of relevant factors to provide for a reasonable and efficient implementation of the program consistent with the statute, and the achievement of water quality goals. See 1 Ver. L. Rev. at 101-102. The narrow holding of the Callaway case was followed in U.S. v. Byrd, 609 F. 2d 1204 (Seventh Cir. 1979); U.S. v. Weisman, 489 F. Supp. 1331 (M.D.F. 1980); State of Wyoming v. Hoffman, 437 F. Supp. 114 (D. Wyo. 1977); Conservation Council of North Carolina v. Constango, 398 F. Supp. 653 (E.D.N.C. 1975), aff'd 633 F.2d 206 (1980).

During this period the EPA attempted to resolve difficulties arising out of similar problems of overly broad application of §402 of the FWPCA in another way: EPA attempted to achieve reasonableness in the §402 program by exempting certain activities otherwise regulated thereunder. This policy resulted in NRDC v. Costle, supra.

NRDC v. Costle, supra, represented a challenge to the EPA's exemption from §402 of certain common results of agricultural activities, e.g., irrigation water runoff. EPA attempted to exempt such activities based on a claim that an administrative nightmare would otherwise result. The court held that Congress intended under §402 to regulate all activities, otherwise exceptions would have been enumerated; such exceptions could not be created administratively by the EPA without the presence of significant hardships and irrationality. The court did not find such conditions, because the agency had broad discretion in implementation in order to avoid absurd or unreasonable administrative burdens under the Act:

> But the District Court and various parties have suggested devices to mitigate the burden -- to accomodate within a practical regulatory scheme Congress's clear mandate that all point sources have permits. _All that is required is that EPA make full use of its interpretational authority_.

(Emphasis added). _Id_. at 1381.

The Court suggested and discussed means such as general permits (for which there was not, at that time, express statutory authorization), a careful redefinition of jurisdiction, and similar interpretive and discretionary mechanisms, and concluded:

> Imagination conjoined with determination will give EPA a capability for practicable implementaion. _Id_. at 1383.

After _NRDC v. Callaway_, _supra_, as a general matter, attempts to rationalize the administration of the §404 program by narrowing jurisdiction were dropped. However, under _NRDC v. Costle_, _supra_, the way was clear to rationalize the FWPCA based programs, even under broad geographic jurisdiction, by adjusting the implementation of the statute. This approach was encouraged further by the terms of the Clean Water Act of 1977.

D. _Clean Water Act of 1977 (Amendments to the FWPCA)._

1. 1977 Amendments. In 1977, Congress enacted amendments to the FWPCA and changed the name of the statute to the Clean Water Act of 1977 (CWA). These amendments left §§404(a), (b), and (c) untouched, but supplemented them by providing over 15 additional subsections to §404 covering a broad spectrum of additional provisions including general permits, exemptions, transfer of the program to the states, etc., which were intended to relieve the burden which the §404 program had placed on the Corps and the public.

2. Response to Previous Litigation.

While Congress has never spoken explicitly on the subject of jurisdiction as defined in *NRDC v. Callaway*, *supra*, it enacted the 1977 amendments without re-visiting the question of jurisdiction. Congress did, however, provide express authority for the EPA's approach to ease the implementation of the program utilizing innovative permit mechanisms. One construction of the Congressional silence on jurisdictional matters, coupled with the endorsement of other forms of implementation, in the 1977 amendments to §404, is that it implicitly upholds the undefined but broad scope of geographic jurisdiction under §404 asserted in *NRDC v. Callaway*, *supra*, while shifting the focus of adjustments to the program to the implementation phase.

The 1977 amendments changed the focus for facilitating goals of reasonableness in the administration of the 404 program. The focus was shifted from narrowing a broad scope of jurisdiction, to the provision of reasonable and innovative means of implementing the §404 program consistent with environmental protection. In this way, the 1977 amendments in essence adopted with respect to §404 the court's approach in, *e.g.*, *NRDC v. Costle*, *supra*, by authorizing exemptions, general permits, etc.

3. *General Goals of 1977 Amendments*. The 1977 amendments changed §404(d)-(t). The focus of these changes was on speeding and easing the permit process. The various means of implementation and exemptions provided by Congress in the CWA are generally discussed below.

(a) *General Permits*.

Section 404(e) authorizes the issuance of "general permits" of broad application which permit whole classes of activity under §404. The issuance of general permits is limited to cases where activities are:

> similar in nature and will cause only minimal adverse environmental impact . . . separately, and . . . cumulatively . . . .
>
> Section 404(e) of the Clean Water Act of 1977, (33 U.S.C. 1344(e)).

In spite of these limitations the general permit program can be a substantial tool to ease bureaucratic burdens. The general permit program is enlarged substantially under the regulations proposed today.

The legislative history of the CWA strongly supports the position that Congress intended general permits to be used extensively to simplify and shorten the permitting process. During consideration of Section 404(e) the Conference Committee Reports highlighted the use of general permits as a primary means for reducing red tape. The Senate report on this bill states:

> . . . general permits issued on a statewide or regionwide basis will greatly reduce administrative paperwork and delay.

Senate Public Works Committee, 95th Congress, 2d Sess., A Legislative History of the Clean Water Act of 1977, Congressional Research Service, Library of Congress, October, 1978, (hereinafter cited as CWA Legislative History), at p. 713.

Senator Baker in the Senate discussion states:

> . . . unnecessary regulation, delays and red tape should be avoided by the use of general permits. . . .

CWA Legislative History, at p. 525.

Furthermore, once a general permit is issued nothing more should be required of an applicant. Representative Roberts in the House debate states:

> Where a general permit has been issued, a person performing an activity covered by the general permit should not be required to obtain permission from the

> Corps of Engineers before proceeding . . . it would be unreasonable to require that the activity not be commenced until the Corps grants its consent. This would defeat the purpose of general permits, which is to avoid individual applications and review.
>
> CWA Legislative History, at p. 349 (emphassis added).

The scope of the general permit program was intended to be left to agency discretion. This is demonstrated in the following colloquy between Senator Muskie and Senator Nunn which occurred during the consideration of the Conference Report:

> Senator Nunn:
>
> Last month the Corps issued nationwide permits with respect to certain dredge and fill activities. The amendment contemplated such permits and I assume that your Committee thought the activities now permitted in the Corps nationwide permits are within the power of the Corps by these amendments.
>
> Senator Muskie:
>
> The Committee did not specifically endorse the Corps' nationwide permit regulations already issued. The content of such general nationwide permits would be a matter of agency interpretation of the language of this amendment. This bill does, however, grant authority for nationwide permits as contemplated in recent Corps regulations.
>
> CWA Legislative History, at p. 1054. (Emphasis added.)

However, the use of a general permit is intended to be subject to careful agency scrutiny, an objective satisfied in the regulations proposed today. Representative Ambro of Long

Island argued during the House Conference debate on the report that close supervision of the general permit program by the agencies was necessary.

> In the name of saving time, the "Corps of Engineers will now be able to issue 'general' permits on a State, regional, or nationwide basis, essentially giving a state control over the wetlands. Without close supervision from either the Corps or the EPA we will almost certainly see economically expedient activities take precedence . . . [over environmental issues] . . . .
>
> CWA Legislative History, at p. 413.

This degree of supervision is provided in Part 330. In summary, the Legislative History indicates that Congress intended that the Corps use a closely supervised general permit program more extensively in order to reduce the burden of the 404 Program. This intent has not been fulfilled in view of the small number of general permits which have actually been issued and the limited activities currently covered by these general permits.

(b) Limit the Time for Corps and Agency Review of Permit Decisions to 90 days.

The one important policy Congress effectuated in the CWA amendments to §404 was to end delays associated with permit issuance. One method to achieve this goal was authorizing general permits under §404(e), discussed above.

Another means of shortening permit time was to encourage cooperation among agencies. Section 404(q) authorizes the Secretary of the Army to enter into agreements with the heads of the various cabinet agencies in order to shorten the permit review process. This Section authorizes such agreements:

> . . . to minimize, to the maximum extent practicable, duplication, needless paperwork, and delays in the issuance of permits under this Section. Such agreement shall . . . assure that . . . a decision . . . will be made not later than the ninetieth day after the date the Notice for such application is published . . . .

§404(q), 33 U.S.C. §1344(q) (emphasis added).

The Senate debate on this Section uniformly endorsed the goal of reducing red tape and limiting the permit issuance time to ninety (90) days. Senator Baker stated during Senate debate that

> "Unnecessary regulation, delays and red tape should be avoided . . .by the direction to Federal agencies to accelerate interagency coordination during the permit review . . . ."

CWA Legislative History at p. 525.

Senator Mathias also explains the Senate's concern with the significant delays of COE permits as follows:

> The bill before us attempts to deal with this time delay problem by encouraging to the maximum extent practicable, that decisions on permits be made within seventy-five (75) days after the Public Notice is issued. I wholeheartedly concur with this proviso and hope that it will spur

> the Corps of Engineers and the agencies with which it must consult to adhere to a time certain for reaching decisions on Section 404 dredge and fill permits.
>
> The problem of long delays experienced in securing dredging and filling permits was recently discussed in a publication of the U.S. Department of Commerce entitled 'Untangling Dredging Regulations.' The Department of Commerce concluded that 'Shortening the time required for permit approval is the most beneficial of dredging regulation reforms.'
>
> CWA Legislative History, at pp. 1047-1048 (emphasis added.).

The CWA also contained §404(m), which provides that the United States Fish and Wildlife service must submit comments under the Fish & Wildlife Coordination Act within 90 days of receipt.

The Conference Committee Report states concerning this section:

> new subsection (m) of §404 requires that within 90 days after the Secretary notifies the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, that an application for a permit under §404(a) has been received by the Secretary or that the Secretary proposes to issue a general permit under §404(e), the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to the application or proposed general permit in writing to the Secretary.
>
> CWA Legislative History, at p. 287.

Under §404(q) and (m), Congress clearly intended to limit time delays arising out of the interagency review process and thereby reduce the administrative burden on the applicant.

However, in spite of this strong Congressional intent and specific statutory language, five years later significant delays still persist. Some grow directly out of Memoranda of Agreement which are violative of the express requirements of §404(q). Others originate in a case-by-case erosion of these clear Congressional policies. The amendments proposed today will eliminate the delay in permit issuance by providing for a strict ninety (90) day permit issuance schedule, and by eliminating existing memoranda of agreement or understanding, and reissuing new memoranda of understanding which are in compliance with the intent of Section 404(q). These actions are taken solely to streamline the interagency review process as Congress intended over five years ago.

(c) Memoranda of Agreement Between Agencies to Reduce Duplication of Regulation and Streamline Interagency Review.

The memoranda of agreement provided for in Section 404(q) discussed above had other purposes beside limiting the review process to 90 days. Congress intended that these memoranda would reduce agency duplication and provide the Corps with pertinent comments to aid it in making its decision.

The 1977 Conference Committee Joint Explanatory Statement states:

> [n]ew section (q) of §404 provides that within 180 days after the date of the enactment of the subsection, the Secretary shall enter into agreements with the Administrator, the Secretaries of the Departments of Agriculture, Commerce, Interior, and Transportation, and the heads of other appropriate federal agencies to minimize to the maximum extent practicable, duplication, needless paperwork, and delays in issuance of permits under §404. The agreements shall be developed to assure that, to the maximum extent practicable, decisions with respect to application under 404(a) will be made within 90 days after the date the notice for such application was proposed.

CWA Legislative History, at p. 287 (emphasis added).

The regulations adopted today minimize such duplicative effort on the part of agencies and the applicant.

(d) Exemptions from Regulation.

New section 404(f) added by Congress in 1977 provided for specific exemptions of certain activities. Such activities include: normal farming, silviculture and ranching activities, emergency repairs to dikes, dams, and similar structures, and construction of farming roads and temporary roads for moving mining equipment. It is instructive of how completely Congress' intent in 1977 has been frustrated to note that these exemptions have never been adopted in the regulations. The Regulations proposed today fully implement §404(f).

V. SIGNIFICANT CHANGES

Significant proposed changes are described below. Minor changes such as re-classifications, new references, rearrangements, new law citations, and new agency names are not identified in this description.

Section 320.1 - Purpose and Scope. This section is rewritten to provide a more accurate outline for the use of these regulations and to explain the Corps of Engineers approach to its regulatory responsibilities.

Section 320.3 - Related legislation. New subsections (n), (o), (p) and (q) are added to include new legislation which emphasizes the importance of energy development to the national interest. These pieces of legislation are significantly related to the Corps review process.

Section 320.4 - General Policies for Implementation. The existing Section 320.4 is entirely deleted since it is nearly totally duplicative of matters found elsewhere in the regulations. It is replaced with a new Section - "General Policies For Implementation Of COE Program." This section emphasizes that the policy of the Corps of Engineers is to conduct its programs in a manner which considers both economic and environmental impacts consistent with applicable law.

The environmental impact review provided for in Section 404 will not be conducted in a vacuum. The Congressional intent of the 404 program was to provide strict and careful environmental control reasonably administered so as to avoid undue economic impacts. The Corps adopts the policy of conducting its permit review consistent with the EPA guidelines provided for in Section 404(b) and not allowing independent review of factors other than those included in the guidelines.

This section also provides that the Corps program will be administered in a manner which minimizes the duplication of regulatory undertakings by reliance wherever possible upon existing Federal, state and local regulatory programs, the application of which mitigate water quality impacts.

Section 320.5 - Interagency Consultation and Review. This new section is designed to define the scope of the interagency review process. Together with this section, all existing memoranda of understanding are revoked and new memoranda of understanding will be issued consistent with the procedures set forth in this section. This section sets forth specific procedures for and requirements of written memoranda of understanding pursuant to Section 404(q) of the Clean Water Act, and provides that the terms of these memoranda will be guided by lawfully promulgated and publicly available regulations.

This section also provides that future memoranda of agreement and memoranda of understanding issued in compliance with Section 404(q) and these regulations shall be published for public comment in the Federal Register..

The purpose of interagency review is to aid in the timely review and to ease administrative burdens to the applicant. Consistent with the requirements of the statute, consultation applicable to COE programs and procedures are provided to insure an orderly and timely review leading to the issuance of a permit within ninety (90) days of the application.

The district engineer's decision is the final decision. The statute gives the district engineer the discretion to accept or deny requests for stipulations and to review comments made by other agencies, and all of those requests and comments must be carefully weighed as a portion of the district engineer's decision. However, interagency vetos or mandates, and administrative appeals are not available except as specifically provided for by statute. Therefore, this section makes it clear that the district engineer makes the final decision as to whether a permit should be issued. In instances posing issues of national importance, the head of an agency may request a Washington level review of a permit during the ninety (90) day period of issuance.

Section 320.6 - Jurisdiction. This new section summarizes the jurisdiction of the Corps of Engineers under Sections 404 and 10. This revision also clarifies the geographic and subject matter limits of Section 404 jurisdiction to provide for appropriate implementation of the program in light of the limited nature of the environmental, social and economic factors to be considered.

Section 320.7 - Permit Decision Criteria. This new section provides the criteria for issuance of permits and conditions thereon. With reference to Section 404 permits, the primary standard is the conformity of the proposed disposal of dredge and fill material to Section 404(b)(1) guidelines promulgated by the EPA at 40 CFR 230. Where the permit is issued solely under Section 9 and Section 10 of the River and Harbor Act, the Corps adopts a list of criteria in this section to guide the COE review of such projects. The Corps today deletes the public interest review which originally provided the permit issuance criteria because it unnecessarily extends beyond the scope and intent of the 404 and §10 permit programs.

Section 322.2(b) - "Structure" definition: The definition of structure is amended to include "offshore drilling rig, pipeline and artifical island" to accommodate the special policies relating to offshore drilling structures under 322.5(d).

Section 322.2(g) - General Permit Consolidation. This section is deleted and is contained in new Section 330 which encompasses all of the materials on general permits.

Section 322.3 - Activities Requiring Permits. This section is amended by deleting some of the repetitive material contained therein.

Section 322.4 - §10 Jurisdiction. Old Section 322.4 is deleted as repetitive. New Section 322.4 is added. This section carefully outlines the scope of Corps jurisdiction pursuant to Section 10 of the River and Harbor Act of 1899 (33 U.S.C. 403).

Under Section 10 the Corps' jurisdiction is limited geographically to "navigable waters," by subject matter to impacts upon the navigable capacity thereof, and the scope of the permit program is limited to a review of navigation and anchorage effects, and an environmental review within these parameters.

Section 322.5(a)-(d) - Relettered. Subsection (b) is incorporated into subsection (a) and the other subsections are relettered. These subsections are amended to eliminate repetitive material.

Section 322.5(d) - Outer Continental Shelf and State Submerged Lands. In the interest of avoiding duplication, this section provides a method of utililzing other significant regulation of structures on the Outer Continental Shelf and structures in state submerged lands for the purpose of oil and gas operations. It limits the review of such structures to their effects on navigation and national security. The Corps has determined that these structures which would otherwise be subject to review for environmental effects are sufficiently evaluated by the BLM in cooperation with Federal agencies so that further review of these factors by the Corps is unnecessary and where applicable, has provided a similar mechanism for such findings with reference to State agency procedures. In these cases, the relevant district engineer shall evaluate the environmental review procedures of the various state agencies authorizing such activities, and where they are found to be sufficient, the Corps will similarly limit its review to navigation and national security. Public comments on the sufficiency of state agency environmental reviews shall be solicited by district engineers.

Appendix A. This appendix is deleted entirely; further memorandum of agreement will be issued in compliance with Section 320.5 and public comments will be requested at that time.

Section 323.2 - Jurisdiction and Implementation of §404 Program. Old section 323.2 is renumbered to 323.3. New section 323.2 outlines with certainty the jurisdiction of the Corps pursuant to Section 404. The geographic jurisdiction extends to "waters of the United States." The subject matter jurisdiction is limited to the discharge of dredge or fill material.

The scope of review of the program is outlined. Various methods of discretionary implementation available to the Corps are discussed.

Section 323.3(c) - Wetlands. The term "wetlands" is deleted and the term "inundated lands" is substituted to provide more clarity and to provide a jurisdictional rather than scientific term, for the determination of what areas are subject to the §404 program. The requirements of inundated lands, vegetation, soils and hydrology (including direct and proximate hydrological communication) together are added to extend the §404 program to inundated lands. These concepts are central to the reasonable administration of the inundated lands program because they clarify the requirement of an actual nexus between wet soils and "waters of the United States" before otherwise saturated soils become "waters of the United States."

A new section 323.3(c)(2) provides a definition of and means of implementation for "Alaska tundra inundated lands" in order to distinguish certain areas of Alaska tundra which are properly subject to §404.

Section 323.3(d) - Adjacent inundated lands. This section is amended to provide a more concise and workable definition of "adjacent inundated lands."

Section 323.3(k) - Fill material definition. The definition of the term "fill material" is amended to clarify that drilling mud disposal is regulated pursuant to Section 402 and is therefore exempt from Section 404 regulation unless actually conducted for the purpose of filling.

Section 323.3(o) - Structure definition. This new section provides that the definition of "structure" as it is defined in Section 322.2(b) also applies to Section 323.

Section 323.3(p) - Mining Equipment definition. This new section provides that the term "mining equipment" shall include oilfield drilling equipment.

Section 323.4 - Outer Continental Shelf and State Submerged Lands. Former Section 323.4 on nationwide permits is deleted and is included in Part 330. Former Section 323.3 will be renumbered to 323.4 and a new subsection (c) added. This new subsection provides that structures on the Outer Continental Shelf or state submerged lands which would otherwise be subject to the requirements of Section 404 will be reviewed for their impacts on national security and navigation only, where they are being constructed under permits to drill or mineral leases from the BLM or a state agency. The reason for this section is identical to that given for §322.5(d), supra. and provides coverage under this policy to artificial islands requiring a §404 permit.

Section 323.5 - Agricultural Exemptions. This new section shall include the Section 404 program exemptions provided for by Section 404(f) and (r) of the Clean Water Act. It should be noted that the language found in Section 323.4 was developed jointly by the Corps of Engineers and the EPA and is found verbatim in the final version of the EPA's consolidated regulations published at 40 CFR. This approach was necessary due to the requirements for consistency between the Corps Section 404 program and the 404 state transfer programs which are subject to EPA approval. If public comment indicates a need to make any substantive changes to the exception language, the Corps will coordinate with EPA to seek amendments to EPA's regulations.

Section 323.6 - Transfer of program to States. Former Section 323.6 is moved to Section 323.1. New §323.6 provides procedures to cover the transfer by EPA of portions of the Section 404 permit program to requesting and qualifying states per Section 404(h) of the Clean Water Act. See EPA transfer regulations at 40 CFR Part 123.

Section 325.1(c) and Section 325.2(a) - Written request for additional information. These sections are amended to require that requests by the district engineer for additional information be in writing and to provide for written notification of completed applications.

Section 325.2(b)(2) (ii) - Time for State Agency Comments. This subparagraph is amended to reduce the time allowed for state agency comment.

Section 325.2(d) - 90 Day Permits. This section is amended to provide for permit issuance within ninety (90) days absent unusual circumstances. If this time requirement is not met, and the proposed activity is in conformity with the guidelines promulgated by the EPA pursuant to Section 404(b)(1) published at 40 CFR 230, the permit is automatically issued and all matters raised in the record are deemed resolved in a light most favorable to the applicant and activities may be undertaken thereunder. However, the District Engineer shall continue to process the permit to ensure final conformance with the statutes.

Section 325.2(e) - Endangered Species Act. This paragraph is added briefly to discuss Corps responsibilities under the Endangered Species Act.

Section 325.3(d) - Criteria for Evaluation of Agency Comments. This new section, provides that comments from agencies will be evaluated in terms of the commenting agency's jurisdiction; comments which are significantly outside the commenting agency's jursidiction will be given less weight at the discretion of the district engineer.

Section 325.4 - Permit Conditions and Stipulations. Former Section 325.4 on Environmental Impact Statements is now covered in 33 CFR 230 regulations. New Section 325.4 provides guidance for the issuance of conditions on permits. Only conditions are allowed which relate to the jurisdiction of the Corps under the relevant program as discussed above. Conditions shall be evaluated for their reasonable achievement of environmental goals without unwarranted economic hardship.

Section 325.5(c) - Forms of Authorization. This new section is added to emphasize the use of general permits pursuant to the provisions of Part 330 of these regulations as forms of authorization.

Section 325.6(e) - Maintenance Dredging. This section is amended to simplify the requirements for maintenance dredging.

Section 325.11 - Reports. This section on reports deleted as unnecessary.

Appendices D - H are revoked. New memoranda of understanding shall be issued consistent with the requirements of Section 320.5 of these regulations, and public comments will be requested at that time.

Section 327.4(b) - Requests for Public Hearings. This section is amended to provide more specific information to the applicant regarding requests for public hearings at the time the public hearing is requested.

Part 328 - Exemption for certain structures commenced prior to 5/27/70 revoked. This section provides generally that permits are not required for structures and fill behind established harbor lines if their construction commenced prior to May 27, 1970. The Corps is interested in receiving comments on the value of retaining this part. If a need for retaining it cannot be established the Corps proposes to revoke Part 328.

Part 329 - Shoreward limit of navigable waters. Based on a West coast court decision, Leslie Salt Co. v. Froehlke, 578 F.2d 742 (9th Circuit 1978) the shoreward limit of navigable waters of the United States (frequently referred to as "Section 10 Waters" in coastal areas is now the mean high water line on both the Atlantic and Pacific coasts formerly mean higher water was used on the Pacific coast). Therefore, Part 329 is being amended to delete the second sentence of Section 329.12(a)(2), which now reads: "However on the Pacific coast line, the line reached by the mean of the higher high waters is used." No other changes are proposed to Part 329, but public comments and suggestions are welcome.

Part 330 - General Permits. This new Part contains procedures for issuance of general permits, a list of existing and proposed nationwide permits, and provisions relating to regional permits. The existing nationwide permits and applicable policies found in 33 CFR 322.4 and 323.4 are combined and relocated to this Part 330. Some of those permits and applicable policies are revised. The existing nationwide permits took effect upon publication in the Federal Register July 19, 1977. The Corps is very interested in receiving public comment on the present nationwide permits since it will in effect be reissuing those permits when Part 330 is published as final rule-making.

When those permits were adopted July 19, 1977 the Corps' authority for general permits were only found in the regulations. The regulations allowed general permits where activities were similar in nature and would cause only minimal individual and cumulative environmental impact. The similar in nature/minimal impact criteria are now legislatively endorsed for the Section 404 permit program by Section 404(e)(1) of the Clean Water Act. However, the discretion of an implementing agency over the application and implementation of its programs is broad. Thus, the Corps also authorizes general permits relating to §§9/10 activities under Part 330.

- The major purpose of Part 330 is to ease regulatory burdens and shorten the time for permit issuance. Various provisions of §404(e), (m), and (q) mandate the timely issuance of permits. The legislative history discussed above clearly evinces an intent to ease the impacts of the program on the applicant and the Nation. Executive Order 12044 directs Federal agencies to reduce regulatory burdens on the public wherever legally possible. Part 330 provides for the achievement of these goals in part by expansion in the use of general permits, both through the issuance of additional nationwide permits, and new regional permits. The Corps is interested in receiving public comment on the expansion of the general permit program to include those activities of other Federal agencies which would have individual or cumulative minimal environmental impact. The Corps also solicits suggestions for future general permit candidates.

Part 330 also provides for the achievement of these purposes in a second way. With the amendments, the Corps proposes a substantial expansion of the general permit program to ease bureaucratic burdens. Traditionally, the minimal impacts criteria was approached as if the Corps' were the only applicable regulatory program. However, in the new regulations, in satisfying the minimal impacts criteria, reliance is provided upon other existing local, state and

Federal regulatory requirements which: (1) substantially mitigate environmental impact of such activities; and (2) which thereby qualify activities as having minimal impacts which otherwise would not be covered by the general permit program. Such regulatory requirements include but are not limited to coastal zone management programs, state and local zoning and land use classifications, and conditions placed upon activities on Federal, state and local leases and permits. By acknowledging the effect of these statutes, ordinances and procedures the Corps feels that the regulatory burdens of the Section 404 permit program will be substantially reduced. Specific guidelines are included in these amendments which encourage the utilization of general permits to ease regulatory burdens. Comments on these guidelines and any comments on how the Corps can make the general permit system work more effectively and efficiently will be welcomed.

One feature of the nationwide permit program about which the Corps is particularly interested in receiving public comment is the need for reporting to the district engineer as a prerequisite to working under a general permit. Some say reporting is necessary to ensure that the activity is in fact covered, to make the applicant aware of the applicable conditions and management practices, and to facilitate monitoring of individual and cumulative impacts. Others feel that the public benefits to be gained by reporting are offset by the resulting delays in paperwork. Furthermore, since many of the activities are of the type which as a practical matter, will not be reported regardless of regulation requirements; they would theoretically be subject to enforcement actions thus adding further demands on regulatory resources. Perhaps some of the activities should be reported and others not.

A number of the general permits proposed in Part 330 involve a discharge into waters of the United States. Section 401(a)(1) of the Clean Water Act provides that discharge permits will not be issued until the state from which the discharge would originate has certified that the discharge will comply with applicable provisions of the Clean Water Act. A certification waiver procedure is also provided by Section 401 because of 1) the nature of the discharges covered by the proposed general permit; 2) the experience to date with the existing general permits; and 3) the controls either provided by the conditions of the general permits or exercised by another agency. The Corps has assumed that all states will want to waive certification requirements (with the exception of nationwide permit Section 330.5(a)(16) (runoff from uplands disposal area) which calls for certification as a condition to the permit). However, any state desiring to exercise its Section 401 certification rights for any or all general permits involving a discharge should notify the Corps so that appropriate exceptions for special requirements can be incorporated into the general permit program. Public comment on this issue will also be welcomed.

Section 307(c) of the Coastal Zone Management Act of 1972 requires non-Federal applicants for permits affecting state coastal zones to certify that the proposed activity would comply with the state's coastal zone management program. Where there are not applicants *per se* for general permits this notice will serve as a certification that the proposed activities covered by the general permits would comply with and be conducted in a manner that is consistent with approved state coastal zone management programs. The Corps solicits comments on this certification statement particularly from state agencies responsible for coastal zone management plans.

While several public hearings were held early in 1981 on the proposed nationwide permits proposed in Part 330, any person may request a further public hearing on the general permits proposed in Part 330, including those already existing. Since some of the general permits may be eliminated or revised based on public comment, it is important that requests for public hearings state the particular permit or permits of concern and what those concerns are. If the Corps determines that a further public hearing or hearings would assist in making a decision on any of the general permits, a thirty (30) day advance notice will be published in the Federal Register advising interested parties of the dates and locations for the hearings.

The Corps will issue by publication in the Federal Register as final rule-making only those general permits found to be in the public interest. The Corps will prepare findings of fact and environmental documentation before adopting any of the general permits. The documentation will include a discussion on the conformity with the EPA guidelines adopted under Section 404(b) of the Clean Water Act for the discharge of dredged or fill material in waters of the United States (40 CFR 230).

A brief outline of the revised and new general permit program follows:

Section 330.1 - Purpose and scope. This section contains the purposes of the general permit program and the standards for issuance of general permits. Subsection (b) provides that environmental reviews conducted by other governmental agencies will be considered when reviewing general permit activities for potential individual or cumulative adverse environmental effects.

Section 330.2 - Procedures. This section outlines the procedures for issuance of general permits.

Section 330.3 - Standards for issuance. This section outlines the standards for issuance of general permits including criteria for issuance, form of authorization, term and procedures for modification.

Section 330.4 - Nationwide permits for discharges before phase-in. The nationwide permits for discharges occurring before the phase-in dates for Section 404 jurisdiction over all waters of the United States are consolidated and simplified in this section.

Section 330.5 - Existing Nationwide permits simplified. The four nationwide permits for discharges into certain waters (currently at Section 323.4-2(a)) would be consolidated and simplified, into two permits - 1) discharges above headwaters and 2) discharges into isolated interstate waters. The exception for lakes greater than ten acres in size is deleted for simplicity. New general permits are included for discharges into coastal zones which are subject to Federally approved state coastal zone management programs and adjacent inundated lands which are not critical inundated lands. The conditions for discharge under these general permits are set forth in paragraph (b).

Section 330.6 - Various General Permits Proposed or Reissued.

Section 330.6(a)(1) - Aids to Navigation. Presently only aids to navigation installed by the Coast Guard are included. This revision would expand the coverage to all aids and regulatory markers regulated by the Coast Guard. This permit also would avoid dual Federal regulatory control.

Section 330.6(a)(4) - Fish and Wildlife Harvesting. Fish and wildlife harvesting activities would be added to this existing nationwide permit since such activities are or can be adequately regulated through other Federal, state and local fishing and hunting regulatory programs or are so minor in impact as not to require any individual review.

Section 330.6(a)(6) - Seismic and Exploration activities. Seismic operations would be added to avoid delays for geophysical survey activities. This Section would also be amended to include exploration activities as well as survey activities.

Section 330.6(a)(7) - Outfall Structures. This section contains a new nationwide permit intended to avoid duplicating the regulatory control exercised by EPA under its Section 402 permitting authority. The public concern and impacts of outfall structures are generally related to what comes out of the pipe rather than to the pipe itself.

Section 330.6(a)(8) - Structures on Submerged Lands. This section proposes to include structures for exploration of oil and gas resources on federal OCS lands, and state submerged lands which are subject to regulation by an appropriate state agency.

Section 330.6(a)(9) - Vessel anchorages. New nationwide permit to avoid duplicating controls exercised by the U.S. Coast Guard over vessel anchorages and moorages.

Section 330.6(a)(10) - Private Mooring Bouys. New nationwide permit to avoid unnecessary Federal control over private mooring bouys.

Section 330.6(a)(11) - Temporary Bouys. New nationwide permit to avoid unnecessary Federal control over temporary markers and bouys.

Section 330.6(a)(12) - Backfill and Bedding for Outfall Structures. The existing nationwide permit would be expanded to include backfill and bedding for intake and outfall structures.

Section 330.6(a)(13) - Bank Stabilization. The existing nationwide permit for banks stabilization applies only to Section 404 authority. It is now proposed to apply it to Section 10 authority as well which necessitates some special conditioning.

Section 330.6(a)(14) - Minor Roadfills and Crossings. Existing nationwide permit for minor road crossing fills is expanded to include road crossing fills which cross wet tundra areas on the North Slope of Alaska.

Section 330.6(a)(15) - Bridge and Road Crossings. Existing nationwide permit for bridge associated fills in tidal waters would be expanded to also apply to non-tidal bridge associated fills where those fills are regulated by the Coast Guard as part of the bridge permit. It is also expanded to include roads or road crossing fills. This would reduce dual Federal regulatory control over non-tidal bridges and road crossings of navigable waters of the United States.

Section 330.6(a)(16) - Return Water from Hydraulically Placed Upland Fill. New nationwide permit to recognize that the return water from dredge material placed hydraulically on upland sites is administratively recognized as a 404 discharge but need not be regulated on an individual basis as long as the water quality concerns are protected through the Section 401 certification procedure. Reducing regulatory burdens on upland disposal should encourage such disposal and avoid the confusion now existing on why hydraulic disposal on the upland needs a 404 permit while non-hydraulic disposal does not.

Section 330.6(a)(17) - Small Hydro-power Plants. New nationwide permit to avoid duplicating the regulatory control exercised by the Department of Energy (FERC) under the Federal Power Act of 1920 for small hydro-power plants.

Section 330.6(a)(18) and (19) - Small Dredge and Fill Activities. New nationwide permits for extremely small dredge and fill activities.

Section 330.6(a)(20) - Oilspill Clean-up operations. New nationwide permit to avoid regulatory delays associated with oil and hazardous substance containments and clean-up operations.

Section 330.6(a)(21) - Duplicated Regulation of Surface Mining Operations. New nationwide permit to avoid duplicating the regulatory control exercised by the Department of the Interior under the Surface Mining Control and Reclamation Act of 1977. The provision for an advance review by the Corps would afford the Corps an opportunity to ensure that the activity needing a Corps permit would have minimal impacts and thus qualify for the nationwide permit.

Section 330.6(a)(22) - Salvage Operations. New nationwide permit for work associated with removal of wrecked vessels and navigational obstructions.

Section 330.6(a)(23) - Duplicated Regulation of Federal Dredge and Fill Activities. New nationwide permit to reduce duplication of effort and unnecessary paperwork concerning activities of other Federal agencies which would have individual or cumulative minimal environmental impacts.

Section 330.6(a)(24) - Duplication under §10 of State §404 Programs. New nationwide permit to avoid duplication under §10 with state administered Section 404 permit programs. Administration of Section 404 programs in waters which are navigable waters of the United States based solely on historical, commercial use may be transferred to qualified states pursuant to Section 404(g) of the Clean Water Act. However, the Corps retains Section 10 permitting authority in these waters, thus the discharge of dredged or fill materials in such waters would require both a Corps Section 10 permit and a state Section 404 permit since both EPA and the Corps have adequate control over the state 404 programs to protect the Federal interests. A nationwide permit to satisfy Section 10 jurisdictional authority would avoid paperwork, duplications and delays.

Section 330.6(a)(25) - Private impoundments not on adjacent inundated lands. New nationwide permit for artificially created impoundments on private industrial or commercial property provided that such impoundments are not adjacent inundated lands.

Section 330.7 - Best Management Practices. This Section dealing with management practices is amended to allow the district engineers to authorize practices different from those set forth in individual situations at the requests of project proponents. If the district engineer deems that there will be minimal or no adverse impact to the aquatic environment from the use of those different practices. Subsection (g) is amended to provide that temporary fills will be removed only where their removal is appropriate since in some situations these fills enhance habitats for local wildlife.

- Appendix A - Alaska Tundra Regional Permit. Appendix A contains a proposed regional permit for dredge and fill activities in tundra areas within the State of Alaska. Comments on this or any of the new regional permit Sections are encouraged.

EXHIBIT I

ADMINISTRATIVE REFORMS TO THE REGULATORY PROGRAM UNDER SECTION 404 OF THE CLEAN WATER ACT AND SECTION 10 OF THE RIVERS AND HARBORS ACT

I. Reducing Uncertainty and Delay

A. The United States Army Corps of Engineers operates the Section 404 and Section 10 permit programs under Memoranda of Agreement with several other federal agencies that have responsibility for commenting to the Corps about the environmental, wildlife, and other aspects of proposed dredging or filling operations. These Memoranda provide for four layers of automatic review or "elevations" of individual permit decisions whenever a commenting agency disagrees with the approach adopted by the Corps. The review process has introduced long delays into a substantial number of major permit applications. It has also been used to blur authority and accountability for final permit decisions, which by statute belong with the Army. These aspects of the program run directly counter to the language of Section 404, which directs that the purpose of the Memoranda of Agreement is to "minimize, to the maximum extent practicable, duplication, needless paperwork, and delays in the issuance of permits" (404(q)), and which does not authorize "appeals" of Corps decisions among federal agencies.

To cure these problems and return the program to the expeditious procedures required by Congress, the Department of the Army and the commenting agencies will prepare new Memoranda of Agreement no later than two months from today providing that:

1. The final permit decision will be made by the District Engineer in the vast majority of cases.

2. The necessity for reopening the record of a case developed by the District Engineer will be minimized.

3. Once the District Engineer gives notice of his intent to issue a permit, his decision will be reviewed only upon the recommendation of the Administrator or Deputy Administrator of the Environmental Protection Agency, the Assistant Secretary of the Interior for Fish and Wildlife and Parks, or the Administrator of the National Oceanic and Atmospheric Administration. Reviews will be limited to cases of insufficient interagency coordination at the District level, the development of significant new information, or the necessity for policy-level review of issues of national importance within the authority of the agency recommending review.

4. Recommendations for review must be made within 15 working days of the District Engineer's notice of intent to issue a permit. Upon receipt of a recommendation for review, the Assistant Secretary of the Army (Civil Works) must decide whether or not to concur within an additional 15 working days. If he does not concur, the District Engineer's decision will be the final decision. If he does concur, he will also determine whether the review and final decision will be made by the Division Engineer, the Chief of Engineers, or by himself; the record of the District Engineer's decision will then be forwarded to the reviewing official within 10, 20, or 30 working days, respectively. In the vast majority of cases the entire review process should be completed within 90 calendar days of the District Engineer's notice of intent to issue a permit; in no case should the review process exceed 120 calendar days.

5. Requests for extensions of time in the basic public comment period from commenting agencies must be made in writing by the Regional Director or Regional Administrator and must demonstrate the need for additional data which could not have been collected during the original period. Time extensions for any individual permit may not exceed 30 days.

6. The Memoranda of Agreement with the Departments of Agriculture and Transportation will provide that the Corps will accept to the extent legally appropriate the environmental documentation and decisions made under the regulations of these departments. Provision should be made for DOT and DOA to elevate a permit action to the ASA(CW) in a similar way to that outlined in paragraphs 3 and 4 above when the District Engineer proposes, contrary to the view of DOT or DOA, to deny a permit on a DOT or DOA project.

7. The Memoranda of Agreement will apply only to permit applications under Section 10 of the Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act, and Section 103 of the Marine Protection Research and Sanctuaries Act (except for compliance with ocean dumping criteria). They will not be used for review of permits for which an exemption has been sought under the Endangered Species Act or for those which have a separate review mechanism.

B. The Army will also revise its own regulations to reduce substantially the time it currently takes to prepare Environmental Impact Statements and other documents required by the National Environmental Policy Act. Furthermore, the Army will take steps to reduce or eliminate delays caused by investigations and other procedures required under the National Historic Preservation Act. Finally, the Army will revise the application process to ensure that only the minimum necessary information is received at the outset, to clarify what is required of applicants, and to limit requests for additional information to that essential for a complete record of the decision.

C. The Army will adopt as soon as practicable administrative measures to reduce the average time for obtaining a decision on a permit application. Strict time limits on the Corps' in-house procedures will be set so that, apart from requirements or procedures mandated by law, a decision on a completed application will ordinarily be forthcoming within 60 days of its receipt. An internal monitoring system will be established to ensure that these time limits are strictly observed. These measures will demonstrate the Army's resolve to demand no less from itself than from other agencies to speed up the Section 404 process. The Army will also consider other measures to reduce the delays to which the program has been prone.

II. Giving the States More Authority and Responsibility

A. The Army will proceed promptly to evaluate existing state programs and to issue general permits for particular categories on a state-wide basis, with appropriate safeguards, in those states whose programs are substantially similar to the Army's regulatory program.

B. The Army will not override decisions made by state and local governments on such matters as zoning or land use, unless water quality, navigation, or other issues of national importance are involved.

C. The EPA will revise its regulations under Section 404(g)-(l) to provide increased incentives and simplified procedures for state assumption of the Section 404 program. Once a state has assumed the program, federal oversight will be kept to the minimum consistent with statutory obligations and considerations of national importance.

III. Reducing Conflicting and Overlapping Policies

A. Recognizing that the Section 404 program will greatly benefit from improved operational controls and reduced jurisdictional conflicts, the Army will:

1. Revise its regulations to reduce the time needed for state action on certification requests to the greatest extent reasonably possible.
2. Review those regulations which affect the Army's Section 404 activities and which impede implementation of the reform measures described herein, and develop proposals to correct the identified deficiencies.

B. The EPA's Section 404(b)(1) guidelines will be shortened, simplified, and made consistent with the reform measures described herein.

IV. Expanding Use of General Permits

The Army will expand the use of general permits on a regional and national basis as quickly as possible, both to minimize delay and paperwork and to eliminate duplication with other federal programs. The Army will vigorously pursue the concept of "state program general permits" for appropriate categories in recognition of states' ongoing efforts to protect environmental quality.

V. Clarifying the Scope of the Permit Program

The Section 404 program has been plagued by uncertainties over its jurisdictional scope. Individuals planning construction, exploration, or development projects in the vicinity of bodies of water have frequently been uncertain whether a Section 404 permit was required, and have sometimes been required to obtain permits or modify projects after they had begun or completed them.

The Administration is strongly committed to protecting the nation's important wetlands. However, a proper regard for Congressional intent and sound administrative practice requires recognition that the purpose of Section 404 is not to restrict development of certain types of land as such, but rather "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." While Congress' definition goes beyond the traditional definition of "navigable waters" covered by earlier Corps regulatory programs, it also does not encompass all biological "wetlands" however defined or regardless of their connection to waters.

The current administrative definitions of the jurisdiction of the Section 404 program, contained in regulations of the EPA and the Corps, need to be clarified to provide better guidance to private parties and the Corps' own District Engineers. EPA and the Army, in consultation with other expert agencies, will develop new and more specific criteria redefining the scope of the program, based upon technical parameters and specifying which types of wetlands are and are not appropriately covered by the Clean Water Act. The purpose of the new criteria will be to introduce a reasonable degree of certainty into the scope of the Section 404 regulatory program and to maintain essential protection of the chemical, physical, and biological integrity of the Nation's waters.

VI. Review of Administrative Reforms

All regulations, guidelines, and Memoranda of Agreement under this reform program will be submitted to the Office of Management and Budget for review under Executive Order 12291 for consistency with the principles set forth in that Order, the policies set forth in the relevant statutes, and the administration's resolve to streamline and simplify the Section 404 regulatory program. The New Memoranda of Agreement will be submitted to OMB for approval within 60 days after the announcement of these regulatory reforms.

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PRESS RELEASE

THE VICE PRESIDENT
OFFICE OF THE PRESS SECRETARY

FOR IMMEDIATE RELEASE
9:00 A.M.
Friday, May 7, 1982

CONTACT: Peter Teeley
Shirley Green
202/456-6772

Time and date are local

Announcement of administrative reforms to the regulatory program under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act

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Christopher C. DeMuth, Executive Director of the Presidential Task Force on Regulatory Relief, today announced the initiation of major administrative reforms of the U.S. Corps of Engineers' permit program. The reforms will dramatically reduce the delays in processing permit applications and, according to rough estimates by the Corps, could save $1 billion annually.

The Corps' permit program implements Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act, and applies to the discharging of dredged or fill material in any U.S. waters. The program was designated for review last August by the Task Force on Regulatory Relief, chaired by Vice President Bush.

"The reforms we are announcing," said Mr. DeMuth, "will eliminate the seemingly endless layers of bureaucratic review associated with the permit program. Currently, the program provides four separate levels of review of a permit decision by several different agencies--all the way from the Corps District Engineer to the Secretary of the Army. The average processing time for permit actions is as high as 815 days for some types of projects. According to Corps studies, today's reforms will reduce by over eighty percent the number of permit applications likely to encounter serious delays."

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The reforms will include: eliminating the multi-level bureaucratic review procedure, expanding the use of general permits, giving states more authority and responsibility for permit decisions, and clarifying the scope of the permit program. This effort to develop a workable and efficient permit program is based on the recommendations of William R. Gianelli, Assistant Secretary of the Army for Civil Works, and senior officials from EPA, the Departments of the Interior and Commerce, and other agencies.

"The Section 404 permit program can be greatly streamlined without sacrificing its environmental protections," Mr. DeMuth said. "Regulatory paralysis is not the way to protect environmental values. It is in everyone's interest to decide as promptly as possible whether a project is consistent with the policies established by Congress. Too much time and money are now wasted sorting through regulatory ambiguities and duplicating work done at the state level. These reforms will return authority to the states where appropriate and will clarify the scope of the program according to Congressional intent."

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FACT SHEET

The U.S. Army Corps of Engineers' Section 10/404 Regulatory Program

- The Federal Water Pollution Control Act Amendments of 1972 as amended by the Clean Water Act of 1977 were enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Section 404 of the Clean Water Act authorizes the Secretary of the Army, acting through the Chief of the U.S. Army Corps of Engineers, to issue permits for the discharge of dredged or fill material into the waters of the United States, applying guidelines developed by the Administrator of the Environmental Protection Agency in conjunction with the Secretary of the Army.

- The Army Corps of Engineers administers Section 404 as part of its regulatory permit program, which also includes Section 10 of the Rivers and Harbors Act of 1899 and Section 103 of the Marine Protection, Research and Santuaries Act. Section 404 expanded the Corps' regulatory program from traditional navigable waters (for which Section 10 permits were also required) to "waters of the United States," which have been construed by some to encompass practically all waters and wetlands.

- Over 100,000 actions are annually affected by the Corps' regulatory program. As allowed by the Act, the Corps has issued "general permits" which do not ordinarily require individual processing. About 90,000 actions annually are covered under general permits. The total number of permits processed individually in one year under Sections 10, 10/404, and 404 is about 18,000. Of these, 43 percent are for Section 10 permits, 40 percent are for Section 10/404 permits, and 17 percent are for Section 404 permits.

- The Act calls for minimization of duplication, needless paperwork, and delays in issuance of permits, and sets a target of ninety days for a decision on an application. For this purpose, the Secretary of the Army is required to develop agreements with heads of other agencies, such as EPA and the Departments of Interior and Commerce, which have statutory responsibilities for advising the Corps about environmental, wildlife, and other impacts of permit applications.

- The Section 404 program has been plagued by severe delays that have generated complaints and imposed heavy economic burdens on the public. Despite recent improvements, average processing time for "delayed" (processing time greater than 120 days) permit actions was 815 days for applications requiring Environmental Impact Statements (EIS), and 270 days for those not requiring an EIS. Roughly 3 of every 10 permit actions are delayed and 1 percent of those delayed require an EIS. Based upon the number of permit aplications experiencing processing time longer than 120 days, the total cost of delays has been estimated on a very rough basis by the Corps to be in excess of $1.5 billion annually.

- A significant part of the delay experienced in the program has resulted from the time extensions frequently requested by commenting agencies and the complex "elevation" process for dispute resolution permitted by the Memoranda of Agreement. An agency that is dissatisfied with a decision of the Corps District Engineer can have the case elevated for reconsideration through four successive decision levels. Furthermore, the threat of elevation, with its concommitant delay in reaching a decision, has often caused applicants to accede to unnecessary and unreasonable changes in their plans. Since March 24, 1980, there were 281 cases where the District Engineer proposed to issue a permit over the objection of another federal agency. Of these, 211 cases were not elevated. Of the remaining 70 cases, 55 were resolved by the Division Engineer, for an average delay time of 150 days. An additional 5 cases are still pending at this level. Five cases were resolved by the Office of the Chief of Engineer, for an average delay time of 320 days. The remaining five cases were resolved by the Assistant Secretary of the Army (Civil Works), for an average delay time of 650 days. Of those 70 cases, 26 elevations were requested by the National Marine Fisheries Service (NMFS), 50 by the U.S. Fish and Wildlife Service (FWS) and 16 by the EPA (an elevation request is sometimes made by more than one agency). The average delay resulting from elevation for these cases was 202 days. The Corps has also estimated that the threat of elevation affected about 1700 other cases, causing an average delay of 75 days.

- Two illustrative cases of delays in the Section 404 program are provided at the end of this fact sheet. The first illustrates the kinds of complications that can arise from several layers of reviews involving different agencies. The second illustrates that long delays have occured even over relatively minor issues.

- The Act contemplates that the states will eventually administer their own dredge and fill permitting programs. It therefore sets out conditions and procedures whereby EPA will approve transfer of authority to such states. These transfer provisions (Section 404(g) thru (l)) and the EPA's implementing regulations are extremely complex and give the states minimal incentives for assuming permitting authority. As yet no state has assumed such authority, although to varying degrees they do administer their own water resource management programs.

- In administering its regulatory program, the Corps is subject to a large number of statutory, executive, and regulatory constraints requiring extensive documentation. These constraints include EPA's detailed guidelines under Section 404(b)(1), EPA's veto authority under Section 404(c), state authority to regulate discharges in navigable waters within their jurisdiction under Section 404(t), state authority to issue water quality certification under Section 401, and coordination with other federal agencies such as FWS, NMFS, EPA, and the Advisory Council on Historic Preservation (and their state counterparts). The NEPA process and Executive Order 11988 on flood plains also apply to the Army's program.

- The Act does not define "waters of the United States" in operational terms. However, it has been interpreted in the broadest possible terms so that considerable uncertainty and difficulty have arisen concerning the extent of the Corps' jurisdiction. This has led over the past decade to several attempts at more precise jurisdictional delineation, both statutory and regulatory, as well as to considerable litigation. Currently, the term is defined by regulation to cover all traditional navigable and interstate waters, their tributaries, and their adjacent wetlands, including such areas as prairie potholes, isolated lakes, and intermittent streams. The Corps has estimated that the area of wetlands that could be associated with its program amounts to hundreds of millions of acres. The process of clarifying precisely what types of bodies of "water" are included in the Section 404 program is still continuing, even though the primary purpose of the Act--protecting the chemical, physical and biological integrity of the Nation's waters--is not in dispute.

- In August 1981, the Presidential Task Force on Regulatory Relief designated the Section 404 regulatory program for review. The administrative and regulatory reforms announced today are based upon the recommendations of an interagency working group, chaired by the Department of the Army and consisting of the Department of Interior, the Department of Commerce, the Environmental Protection Agency, and the Office of Management and Budget. In developing its recommendations, the working group received helpful suggestions and information from government agencies and several state officials and private citizens and organizations. Both the administrative and the regulatory reforms are scheduled to be implemented over the next 2-6 months. The Corps expects that these reforms, when fully in place, will reduce significantly the number of permit applications likely to experience significant delays. They can be translated, roughly, into a cost savings in excess of $1 billion annually, based on the estimated cost of current permit delays of more than $1.5 billion.

CASE SUMMARY NO. 1

LAKE ALMA PERMIT

The Lake Alma project was originally part of a Department of Housing and Urban Development grant to construct a public reservoir to help satisfy water-oriented recreation needs of the City of Alma and Bacon County, Georgia, and to stimulate economic growth in the region.

On October 4, 1977, the City of Alma and Bacon County Commissioners applied for an Army Section 404 permit. The application called for the construction of an earthen dam to create a 1,400 acre recreation lake on Hurricane Creek.

EPA and the US Fish and Wildlife Service objected to issuing the permit on the ground that the project did not justify elimination of approximately 1,400 acres of wetlands and that quality of the lake water would be unacceptable for recreational uses. The Georgia Department of Natural Resources supported the project citing the relative low quality of the existing wetlands; the Environmental Protection Division of DNR stated that water quality in the proposed lake would meet or exceed all applicable water quality standards for recreational waters.

The FWS conducted an evaluation of the project and submitted a mitigation plan which included a provision that the applicants purchase and manage additional acreage to offset the loss of wildlife habitat. Following acceptance of the mitigation plan by the applicants, FWS withdrew its objection.

The mitigation plan included a group of six small artificial lakes (green tree reservoirs, comprising a total of 194 acres) to be constructed and managed for wildlife habitat. EPA then added to its objection the concern that the green tree reservoirs would be detrimental to water quality. EPA continued its objection to the project as it was elevated through the Division Engineer and the Chief of Engineers to the Assistant Secretary of the Army for Civil Works, with each level trying to resolve EPA's concerns. When the ASA(CW) received the report in August 1981, he consulted with EPA and called for a restudy of the green tree reserviors. Upon completion of the study, the ASA(CW) directed the issuance of the permit. In September 1981 he transmitted his decision to the EPA Administrator who could have, but did not, elevate the matter to the Secretary of the Army.

The permit was finally issued on November 10, 1981, four years after the application.

CASE SUMMARY NO. 2

CAMERON CONSTRUCTION COMPANY

On June 19, 1979 the Cameron Construction Company applied for a Corps permit to convert 10 acres of marsh along a navigation channel to a water oriented commercial use. The proposed project would allow Cameron Construction to expand its operations in Cameron, Louisiana, to meet the increased needs of energy producers. The proposed site is near Cameron Construction's existing facility and would require the placement of fill material over the 10 acres and construction of a 614-foot long bulkhead.

The National Marine Fisheries Service, part of the Department of Commerce, objected to the permit on the grounds that the project would have significant adverse consequences on important marine resources and that there were other viable alternatives. The Corps of Engineers disagreed with NMFS and proposed to issue the permit. Subsequently, in accordance with the 404(q) Memorandum of Agreement, NMFS elevated the issue to the Division Engineer and then to the Chief of Engineers. At each level, the Corps weighed all factors, including the concerns of NMFS, and found that the public interest was best served by issuing the permit.

On February 2, 1981, the matter was elevated to the Assistant Secretary of the Army for Civil Works. After evaluating all aspects of the issue, the ASA(CW) found that, although the 10 acres of wetlands would be lost, this only represented five ten-thousandths of one percent of the total wetlands in the area and that the benefits to be gained from the project were considerable. Further, he found that the Corps had adequately evaluated eight alternatives to the proposed action and had found that none of them offered significant advantages over the proposal.

In April 1981, the ASA(CW) decided that it was in the public interest to issue the permit and directed the Corps of Engineers to do so. The permit was issued on June 20, 1981, two years after the application.

EXHIBIT J

ted stevens

United States Senate, Washington, D.C., 20510 (202) 224-3004

united states senator for alaska

May, 1982

Alaskans who responded to Senator Stevens' survey last year showed strong opinions on a number of issues.

Their answers, tabulated in percentages to the right of the questions, are listed below on pages 2 and 3.

Among the issues which evoked a large percentage of support was the concept of "workfare," where welfare recipients, with certain exceptions, work while receiving benefits. (Question 11).

Another item of importance to the 6,700 Alaskans who returned their questionnaires, was maintaining Senator Stevens' offices in the state. (Question 2)

Each of the 16 questions brought additional response in the form of letters from Alaskans who wished to explore issues further, or who wished to present their views in greater detail. Constituents' correspondence is always welcome.

The Senator's offices in Juneau, Fairbanks, Anchorage, Nome, Kenai and Ketchikan are there to assist Alaskans whenever possible. The addresses and telephone numbers are included in this newsletter.

Survey Results

Q. 5 The Clean Water Act currently includes a section requiring the Army Corps of Engineers to regulate the use of wetland areas. The Corps defines wetlands as lands inundated or saturated by surface or ground water sufficient to support vegetation typically adapted for life in saturated soils, which includes tundra and marshes. Which of the following best reflects your views on this regulation?

(1) THE FEDERAL GOVERNMENT SHOULD NOT BE REGULATING PRIVATELY OWNED WETLANDS. 31.6%

(2) I WOULD PREFER THE STATE TO SET AND ENFORCE REGULATIONS, IF THERE ARE TO BE REGULATIONS 50.5

(3) THE FEDERAL GOVERNMENT SHOULD BE REGULATING WETLAND AREAS, WHETHER OR NOT THE LAND IS FEDERALLY OWNED 10.9

(4) NONE OF THESE REFLECT MY VIEWS 4.0

(5) I HAVE NO OPINION 3.1

Testimony of

ARCO ALASKA, INC.

Subsidiary of

ATLANTIC RICHFIELD COMPANY

Presented at

ALASKA FIELD HEARING

of

SENATE ENVIRONMENT AND PUBLIC WORKS

SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION

JULY 8, 1982

ANCHORAGE, ALASKA

TESTIMONY

Mr. Chairman, I am Tim Derigo of ARCO Alaska, Inc., a Subsidiary of Atlantic Richfield Company. I am a Senior Landman for the Company. I have had first hand experience with the Section 404 permitting process. Furthermore, my department is involved in every 404 permit application that the Company files with respect to its north slope production operations.

The Atlantic Richfield Company appreciates this opportunity to discuss with you the impacts of the Section 404 dredge or fill permit program on ARCO Alaska's operations in the State of Alaska.

We fully support the fundamental intent of the Section 404 permit program which is to ensure that discharge of dredge or fill material does no damage to surface water quality. It has also become evident that the wetlands from which surface waters flow must be protected from indiscriminate dumping if water quality is to be maintained. Adjacent wetlands often act as natural water treatment systems, removing pollutants before they reach the surface waters; serve as recharge zones; and act as breeding grounds and nurseries for important aquatic life. Control of the water quality of such immediately adjacent wetlands is an appropriate function of the Clean Water Act (CWA).

However, efforts to protect these areas have resulted in judicial interpretations and regulatory decisions that have unnecessarily expanded the scope and complexity of the 404 permit program far beyond the streams and rivers and adjacent wetlands recognized to be important to water quality. Section 404 has effectively become a federal land use control program duplicating existing functions of states such as Alaska and other federal agencies.

The problems with Section 404 that I will discuss today are producing inefficiency and redundancy, and unnecessary delays and costs. These problems significantly affect oil and gas development operations while providing little environmental benefit. Many of these problems can be mitigated through regulatory reform. In this regard, we support and are participating where appropriate in the ongoing efforts of the Corps of Engineers (Corps) and other administrative agencies to upgrade and streamline the present 404 regulatory process.

But our basic premise is that the current interpretations of the CWA and its regulations have caused the Corps to overreach itself in Alaska by declaring administratively that all wet tundra is subject to Section 404. Although moist and dry tundra were theoretically not included, in practice no distinction is made between types of tundra in the application of the program. The effect of including all tundra forces us, along with scores of people in state and federal agencies, to engage in a time-consuming exercise that produces little, if any, protection that is not already afforded by existing Alaska state law.

Section 404 has not applied to most of the North Slope until quite recently because it was not until 1979 that the Corps decided to define all tundra as wetlands. In the nearly two decades of operation on the North Slope, ARCO Alaska and other petroleum companies have developed expertise and adopted operating techniques to protect the landscape and plant and animal life. In addition, the state government, through its natural resources, environmental conservation and wildlife agencies, practices diligent oversight of all North Slope activities. Thus, proper protection of Alaskan environmental resources would be provided without Section 404 duplication. For example, the Trans Alaska Pipeline was completed in an environmentally safe manner across vast areas of tundra without the Federal 404 program.

With respect to most oil and gas activities on the Alaskan North Slope, State and Federal permit stipulations generally address the same critical concerns regarding wildlife, air, water and land use planning. The U.S. Fish and Wildlife Service (FWS) duplicates Alaska Department of Fish and Game (ADFG) efforts; Environmental Protection Agency (EPA) duplicates Alaska Department of Environmental Conservation (ADEC) efforts; and the land use provisions of the 404 program duplicate similar authorities covered under the Alaska Coastal Management Program and local land use planning. This redundancy of agency effort has not resulted in more environmentally sound projects.

We have attached to the written testimony detailed case studies of the impact of Section 404 on our operations. The balance of our testimony will discuss some of the points made in these studies and review Atlantic Richfield Company's recommendations for changes to Section 404 of the Clean Water Act.

The average cost to ARCO Alaska for processing a 404 permit application for major projects is approximately $100,000, exclusive of the expense of any delays incurred and actual compliance with permit conditions (Case Study 1). This $100,000 includes only the expenses associated with the staff and resources necessary to prepare the permit application, evaluate proposed permit conditions, draw up any necessary design changes, and perform any environmental studies and monitoring required to obtain a permit. Based on a normal requirement of 20 to 40 permits per year on the North Slope, these "administrative expenses" add approximately $2 million to $4 million annually to the cost of our operations. Additionally, this reflects a 1200 percent increase in staffing relative to our previous operations under only a state permitting program. These additional expenses and the associated consumption of internal resources are incurred with minimal environmental enhancement or mitigating effect.

When delay and compliance with permit conditions are included, the total costs associated with the present 404 permit program can add tens of millions of dollars annually to our operations. Much of this additional expense for delay and permit conditions also cannot be equated to verifiable environmental benefits. This represents an unacceptable waste of valuable resources that otherwise could be employed to explore for and develop badly needed domestic suppies of oil and gas.

One of the most costly ramifications of the 404 Program is delay. The Clean Water Act specifies that to the maximum extent possible no more than 90 days should be required to make a final decision on 404 permits. However, the Corps has rarely been able to comply with this provision of the law.

Our records show that to obtain 404 permits for ARCO Alaska's North Slope operations requires an average of 168 days - which is nearly twice the maximum time intended by Congress (Case Study 1). This average processing time does not include the two months or so normally spent in "pre-application" discussions and negotiations ostensibly designed to streamline the permit process.

In a large percent of these applications, negotiations with the various state and federal agencies involved in the 404 review process extend the processing time, occasionally approaching a year. This extra delay substantially increases permitting, construction and operating costs.

Because of the harsh North Slope weather and the demand for drilling equipment, well-logging crews, and other contractor services and materials, binding commitments must be made well in advance of the start of an oil and gas operation. If our project planner allows five months or so for permit processing, and that time is extended, then expensive materials and equipment lie idle; surcharges are paid to contractors for interrupted work and schedule alterations; and, through inflation alone, material and labor costs escalate.

The Corps has taken some steps to alleviate this problem of excessive delay. For example, last year the Alaska District of the Corps promulgated three General Permits (Case Study 2). In situations where applicable, these General Permits have resulted in a more expeditious handling of routine applications for small gravel placement that is routinely required in intensive oilfield development. However, General Permits cover only approximately 30% of our permit applications and less than 20% of the total volume of gravel permitted. Even projects which fall within the scope of the General Permits still require 60-75 days, including pre-application review and formal processing. Thus, to date, the use of General Permits in Alaska to streamline the 404 Program has fallen far short of our expectations.

The five case studies we have included with our testimony vividly illustrate these problems of overlapping responsibilities, and the unnecessary costs and delay associated with the 404 program. Additionally, these case studies illustrate other related problems such as:

- The threat of delay,
- Permit conditions of questionable benefit,
- Overly conservative permit conditions,
- Lack of appropriate Corps authority, and
- Redundancy of review.

The Threat of Delay

The mere threat of delay can force a company to agree to otherwise unacceptable permit conditions. In Alaska, a company cannot in many cases take the time to contest a proposed permit stipulation if the resulting delay conflicts with seasonal operating restrictions designed to prevent disruption of wildlife migration patterns, or if it would transform a summertime activity into a more costly wintertime operation.

For example (Case Study 3), in 1979, ARCO Alaska filed simultaneously for a 404 permit with the Corps and a state drilling permit with the Alaska Department of Natural Resources (ADNR) for construction of Drill Sites 16 and 17 and associated flowlines at Prudhoe Bay. As you will note from the attached case study, the Alaska Department of Fish and Game (ADFG) recommended conditions for the state permit. Following a thorough review, the ADNR, in its role as the lead agency in the state drilling permit program, decided not to include the ADFG conditions on the state drilling permit.

However, through the commentary process, the ADFG in conjunction with the U.S. Fish and Wildlife Service recommended similar conditions for the 404 permit. ARCO Alaska was forced to accept these conditions on the 404 permit or suffer extended delay in negotiations with the resource agencies.

The acceptance of these conditions to the permit was a function of the threat of delay and the inability of the Corps to effectively mediate the dispute between the applicant and the reviewing agency, not the validity of the permit conditions.

Conditions of Questionable Benefit

Another problem that we have encountered is that permit conditions oftentimes produce no water quality improvements or any other environmental benefits.

For example (Case Studies 2 and 4), design and operating specifications are regularly attached to North Slope 404 permits to protect caribou herds.

Section 404 permits often require construction of caribou crossings without a full understanding of their necessity or proper placement. However, studies in the Kuparuk River Oil Field have shown that caribou use a variety of ways to get over or under above ground pipelines, indicating that the requirement of pipeline crossings on 404 permits should not under normal conditions be necessary.

Other Section 404 permit conditions relating to gravel pad and road construction have included returning the area to its original condition. However, experience in Prudhoe Bay has shown that the caribou actually use the gravel pads and roads to get above the swarms of insects that annoy them during the summer. Removal of the gravel not only does not protect the herds but may be environmentally detrimental.

One other related problem in this regard is that to get reviewing agency agreement for North Slope 404 permits, an operator may have to conduct various studies that have nothing to do with protection of wetlands or water quality, e.g. Prudhoe Bay Waterflood

Project. In effect, the 404 permit process has been used as a means to fund general environmental research.

Conservative Permit Conditions

As noted previously, the Corps has issued three General Permits for North Slope operations (Case Study 2). However, rather than drawing upon the wealth of experience with oil and natural gas development in the region to establish appropriate permit conditions for these General Permits, an overly conservative approach has been chosen. For example, the General Permits require four-foot gravel pads or its equivalent for all circumstances even though individual permits have traditionally required only three-foot pads for lightly used areas. Light use generates practically no heat and, therefore, poses no danger of thaw to the permafrost. Again, compliance with such excessively conservative permit conditions increases the cost of our operations with little or no resulting environmental enhancement or mitigation.

Corps Authority

The Corps' administrative process for reviewing 404 permit applications makes it especially difficult to contest unwarranted permit stipulations. The existing system virtually obligates the Corps to accept reviewing agency conditions without modifications. Additionally, the Memoranda of Agreement between the Corps and reviewing agencies have essentially stripped the Corps of its mediating powers by enhancing the authority of the reviewing agencies beyond that intended by Congress. A decision maker between the permit applicant and a reviewing agency is needed; otherwise, the permittee has no ready avenue for eliciting substantiating evidence from a reviewing agency for any objections or proposed permit conditions that appear to be unjustifiable, or protection from having to accept questionable permit conditions in order to proceed in a timely manner with a proposed project.

A good example of the penalties placed on a permittee by the enhanced power of the reviewing agencies is the Kuparuk Pipeline (Case Study 4). In commenting on our application, which was subjected to numerous extensions of the normal public comment period, the U.S. Fish and Wildlife Service (FWS) in one paragraph of a three page memorandum demanded a series of unsubstantiated permit conditions estimated to cost hundreds of thousands of dollars. Prophesying destruction of the Central Arctic Caribou Herd, the FWS also demanded copies of our five year development plan for the entire Prudhoe Bay area. Our five year plan is an extremely sensitive proprietary document and could not be released.

During the subsequent eighteen months, through meetings, letters and telephone conversations, ARCO Alaska sought the justification for the FWS demands without adequate response. Unable to tolerate further delay while continuing to seek substantiation from the FWS for its demands, we simultaneously entered into discussions with the Corps and other reviewing agencies to negotiate a set of permit conditions. We ultimately had to accept some of the permit conditions without resolution of the question of the FWS's substantiation in order to begin construction.

Redundancy of Review

One final example clearly illustrates the need to streamline the 404 program. In 1977, ARCO Alaska proposed construction of a bridge across the Kuparuk River (Case Study 5). Construction of the bridge required permits from the Alaska Department of Natural Resources (ADNR) pursuant to the oil and gas lease, from the Alaska

Department of Fish and Game (ADFG) pursuant to the Anadromous Fish Protection Regulations, from the North Slope Borough under its local zoning ordinance, from the U.S. Coast Guard under Section 10 of the Rivers and Harbors Act, and finally, from the Corps under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act.

This meant that the ADFG reviewed the same project under four different permitting processes, as well as through its own Anadromous Fish Protection Regulations. In fact, every Section 404 reviewing agency reviewed the project under at least one other permit application. The chart attached to the case study indicates that administrative overlap and multiple submissions produced 26 channels of review on the same aspects of the same project by the reviewing agencies. Clearly, a change in the CWA simplifying the process for delegation of the Section 404 authority to the state would not endanger water quality or protection of the environment, and would reduce the unnecessary duplication of review inherent in the present program.

Summary

In summary, ARCO Alaska's experience with Section 404 in Alaska has shown that:

- The jurisdiction of the Corps over tundra is unnecessarily broad.
- Existing state law provides ample protection for the tundra.
- The Corps ability to effectively mediate disputes between an applicant and reviewing agencies is limited far beyond what was originally intended by Congress.

- The lack of specifics in the federal Clean Water Act and implementing regulations allow imposition of permit conditions that are neither germane nor cost-effective.
- The multiple layers of review provided by the present 404 permit system embody redundancy and overlap; and promote delay in permit processing.
- The lack of binding deadlines in the Statute also leads to unnecessary delay.
- The current Alaska General Permits have provided little real regulatory relief to date.

ARCO Alaska's parent, Atlantic Richfield Company, is encouraged by the efforts of the Corps to effect regulatory reforms in the current 404 Program that could ease the situation considerably. However, regulatory reform alone will not produce a complete or lasting cure. Therefore, we recommend that Congress amend the Clean Water Act to:

- Give states such as Alaska more authority over their wetland resources through a two step process:
  - Limiting federal jurisdiction under Section 404 to those waters that are currently navigable or susceptible to navigability by reasonable improvement, together with adjacent wetlands and major tributaries critical to the water quality of these waters.

- Revising the process for delegating to the states primary enforcement authority for Section 404. As presently constructed, the 404 delegation process is so cumbersome that no state has been willing to take on primacy. The delegation provision should be amended to require the EPA and Corps to grant primacy to those states that have programs in place meeting the Statutory requirements of Section 404.

o Specify that the Corps is the authority for the issuance of permits and the determination of appropriate permit conditions under Section 404, and that the other involved federal agencies serve only in the capacity of advisors to the Corps.

o Require the Corps to establish cost-effectiveness as a criterion in evaluating alternative permit stipulations. If a more costly condition is recommended, the Corps should be required to justify its decision.

o Require the Corps and reviewing agencies to demonstrate that any suggested permit stipulations are directly related to the water quality purposes of Section 404 and other primary environmental effects of a project resulting from a change in water quality. (Other primary environmental effects could include such things as compliance with the National Environmental Policy Act or the Endangered Species Act, as applicable.) Such a requirement would rule out the imposition of unnecessary data gathering and study requirements designed to collect information at the permittee's expense.

- Strengthen the General Permit provisions to require, rather than to allow as in current law, the use of General Permits for activities that are similar in nature, cause only minimal environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Further, the Corps should be required to demonstrate that any conditions written into a General Permit are based on prior area specific operating experience whenever available and mitigate adverse environmental effects that have some reasonable likelihood of occurring as a result of the specific activity for which the permit is required.

Taken together, adoption of these recommendations will do much to eliminate unnecessary costs and delay while ensuring that the purposes of Section 404 are met. I will be happy to answer any questions you might have.

CASE HISTORY NO. 1

KUPARUK AND PRUDHOE BAY COE PERMITS, 1980-81

Summary

In 1980 and 1981, ARCO Alaska, Inc. was required to obtain 47 Corps of Engineers permits for activities in the Kuparuk field and Prudhoe Bay. The average permitting time was 5-1/2 months.

ARCO Alaska has twenty-four full time employees for whom Section 404 related issues are a principal responsibility. Significant additional personnel resources are consumed in support functions such as engineering and scientific evaluations of potential permit conditions, redesign and rescheduling of projects to conform to permit stipuations, management and evaluation of required environmental studies, etc.

The annual hidden or internal resource costs is $2.5 MM. An average of approximately one man year of Section 404 effort must be expended for each Section 404 permit obtained.

Problems Illustrated

Costs

An order of magnitude estimate of the internal resource (hidden) cost of permit processing is approximately $100,000/permit. This cost is a direct function of permit complexity. The manpower allocation makes possible acceptable permit processing. The vast majority of these hidden costs have no direct benefit to the environment.

Delay

The average permitting time was 168 days exclusive of pre-permitting negotiation requirements. This is over half again as much time as Congress envisioned as the maximum.

Permit Processing

A summary was made of the resources ARCO Alaska, Inc. must utilize to properly process the Corps of Engineers permits required for Kuparuk and Prudhoe Bay (see attached listing) for 1980 and 1981. ARCO Alaska processed 20 permits in 1980 and 27 in 1981. In 1980 the average permit time was six months; in 1981, five months.

To adequately process these 20 to 40 permits per year, ARCO Alaska retains eighteen professional and six support personnel whose principal responsibilities are Section 404. These personnel are required to evaluate and determine compliance with regulations, make and process permit applications, negotiate permit conditions, and manage the millions of dollars each year in environmental studies resulting from Section 404 permit conditions.

In addition to these employees, significant engineering and environmental specialty manhours are spent supporting their efforts. Examples of the types of support these personnel supply are:

1. Performance of detailed evaluations for each permit condition recommended by any reviewing agency including:
    a. The perceived environmental damage or risk suggested by the agency.
    b. The engineering feasibility and safety of the proposed permit condition.
    c. The probability of the permit stipulation mitigating the perceived environmental problem.
    d. The cost, including delay, to the project and conditional project economic feasibility.
    e. The rescheduling requirements.
2. Provision of specialized expert resources in ascertaining the environmental effects of a project.
3. Redesign and reschedule of projects to conform to permit conditions.
4. Provision of accounting and control functions for the environmental study contracts.
5. Evaluation of emerging regulatory issues, the forecasting of regulatory compliance requirements, and supplying to agencies industrial perspective of proposed actions.

Exact data on internal resource costs of Section 404 in Alaska are not available. However, an order of magnitude estimate is \$2.5 MM/yr. These costs are in addition to other Section 404 expenses such as studies, delays, permit conditions, construction and operating restrictions, etc.

SECTION 404 PERMITS
PRUDHOE BAY AND KUPARUK OPERATIONS
APPLICATION PROCESSING TIMES

Summary*

1980 Season

Average Processing Times:	Prudhoe Bay	174 days
	Kuparuk	232 days
	Combined	186 days

1981 Season

Average Processing Times:	Prudhoe Bay	120 days
	Kuparuk	184 days
	Combined	155 days

Combined Average	168 days

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*See attached pages for individual permit processing times.

SECTION 404 PERMITS
PRUDHOE BAY OPERATIONS
APPLICATION PROCESSING TIMES

Individual Permit Applications

	BS #	Facility	Date Applied	Date Issued	Processing Time (Days)
1980 Season	42	F.S. 1	11/21/79	04/21/80	163
	41	F.S. 2	11/26/79	04/25/80	163
	40	F.S. 3	11/27/79	04/21/80	157
	36	CCP/FFGU	11/03/79	04/21/80	139
	65	D.S. 1	12/03/79	05/09/80	157
	66	D.S. 3	12/03/79	05/09/80	157
	67	D.S. 4	12/03/79	05/07/80	156
	68	D.S. 5	12/03/79	05/05/80	154
	69	D.S. 6	12/03/79	05/22/80	170
	70	D.S. 7	12/03/79	05/07/80	156
	71	D.S. 11	12/03/79	05/07/80	156
	74	D.S. 14	12/03/79	05/22/80	170
	75	D.S. 15	12/03/79	05/09/80	158
	76	D.S. 18	12/03/79	05/05/80	154
	82	MCC	02/07/80	05/09/80	92
	90	COTU Exp.	04/03/80	06/20/80	78
1981 Season	116	T-3C Well	08/06/80	01/12/81	101
	118	Sag River	08/15/80	10/03/80	49
	126	D.S. 17 Exp.	10/03/80	01/12/81	101
	148	D.S. 2 Exp.	10/17/80	02/10/81	116
	146	D.S. 11 Rel. Pit	10/17/80	02/10/81	116
	147	D.S. 9 Exp.	10/17/80	02/10/81	116
	145	Storage Pad and Access Roads	10/17/80	02/10/81	116
	144	D.S. 16 Exp.	10/17/80	02/10/81	116
	150	PBOC Exp.	11/12/80	05/15/81	116
	173	Put 23 Exp.	12/12/80	03/23/81	101
	21	Waterflood (Onshore Fill)	04/02/80	02/09/81	313

SECTION 404 PERMITS
KUPARUK OPERATIONS
APPLICATION PROCESSING TIMES

Individual Permit Applications

	BS #	Facility	Date Applied	Date Issued	Processing Time (Days)
1980 Season	37	Pipeline	11/26/79	04/21/80	147
	35	Gravel Work flowlines	11/26/79	08/01/80	378
	26	Flare Pit and Sewage Lagoon Expansion	11/13/79	07/23/80	253
	39	Reroute at Gravel Pit B	11/26/79	04/25/80	151
1981 Season	129	D.S. A Exp.	08/22/80	05/12/81	218
	130	D.S. B Exp.	10/07/80	05/05/81	210
	131	D.S. C Exp.	10/07/80	05/15/81	220
	132	D.S. C Exp.	10/07/80	02/21/81	137
	133	D.S. E Exp.	10/07/80	05/05/81	210
	134	D.S. F Exp.	10/07/80	05/27/81	171
	135	D.S. G New	10/07/80	03/27/81	171
	136	D.S. H New	10/07/80	03/27/81	171
	137	D.S. I New	10/07/80	05/15/81	220
	138	D.S. J New	10/07/80	05/28/81	232
	139	D.S. EA New	10/07/80	05/11/81	216
	139	D.S. EB New	10/07/80	05/28/81	232
	110	CPF Exp. (Pad)	09/26/80	12/08/80	73
	158	Airstrip Exp.	11/20/80	04/21/81	152
	125	Mine Site C Exp.	09/16/80	01/16/81	122

CASE STUDY NO. 2

ALASKA GENERAL PERMITTING

Summary

The Corps of Engineers alleviated some of the delay problems in Section 404 permitting by issuing general permits for construction and expansion of drilling pads, storage pads, general use pads and access roads in wet tundra areas of the Alaska North Slope. These permits contain elements not normally found in general permits:

- A preapplication meeting held with resource agencies to inform them of the project and negotiate any special conditions.
- Submission of a complete application including all elements required for an individual permit.
- A public comment period.
- A case by case elective public interest review.

The relief for oil and gas operations provided by this general permit is limited by its complexity and the time required to process (75 days).

Problems Illustrated

Delay

Although the intent of the general permit was to reduce the delay to 30 days, it has in fact only reduced it to 75 days - approaching the maximum permitting period anticipated by Congress.

Corps Abdicated Authority

The general permit contains a provision which requires the applicant to meet with the resource agencies, negotiate permit conditions and mediate interagency conflicts. No mention is made of any Corps activity during or even attendance at these meetings.

Economic Considerations

The Corps did not provide enough flexibility in spite of industry comments. Common situations not requiring the extensive controls of a drill pad had the same rigorous permit conditions. The restrictive approach simplified the permit but resulted in excessive cost to the users.

Lack of True Permit

The "general permit" is not actually a permit, but an expediting procedure, a set of standards speeding processing.

Unrelated Permit Conditions

The permits for pipeline pads regulate the height of the pipelines. The height of the pipeline has nothing to do with the "chemical, physical, and biological integrity of the nation's waters," nor relate to the pipeline pad permitted. It is an example of using the Section 404 permit as a general vehicle for environmental control.

Permit Summary

On October 9, 1981, The Corps of Engineers issued three "general permits" covering oil and gas extraction activities in Alaska. These permits covered dredge and fill activities in wet tundra for:

- Expansion of drilling pads, storage pads, and general use pads.
- Construction of drilling pads, storage pads and general use pads.
- Construction of access roads.

The permit does not actually authorize activity on the wet tundra. It does instead specify the criteria under which that activity can be authorized. Prior to any activity under the "general permit," an operator must apply for and obtain a letter of authorization. The letter may or may not contain special stipulations as a result of project review by the Corps, state or wildlife agencies.

The process in applying for a letter of authorization is almost identical to the formal application process prior to issuance of the general permit.

- The applicant must attend a preapplication coordination conference with State and Federal resource agencies.
    - He must present the project.
    - He must identify the site in sufficient detail for the resource agencies to make a determination of the appropriateness of the project.
    - He must negotiate with the resource agencies any special conditions to be attached to the letter of authorization.
    - He must resolve any interagency conflicts on resource utilization.
- An application must then be submitted to the Corps (identical to an individual permit).
- The application is subjected to an (abbreviated) resource agency comment period.
- The application is then examined by the district engineer to determine if a full public interest review is required.

- If the application is approved the letter of authorization is issued.

- Sixty days after construction is complete the "as built" engineering drawings must be submitted to the district engineer.

According to the permit language, the preapplication conference could occur immediately prior to submission of the application. In actuality a ten to thirty day period is normally required to revise the application to account for resource agency comments. ARCO Alaska, Inc. has experienced a 50 day turn around time from application to the letter of authorization. Seventy-five days must normally be budgeted for permit processing.

The general permit offers three significant advantages over individual permits and for this reason it is used in every applicable circumstance:

1. It requires one-half the permit process time of individual permits.

2. The permit conditions are fixed allowing more exact cost estimating and project control.

3. The permits are likely to issue as long as AOGC accepts the conditions.

There is, however, often an economic penalty paid for the benefits in the form of more severe permit conditions, such as:

- Four feet of gravel is required for a road bed where 3' was customary in individual permits;

- Instrument pads which have no heat also require four feet of gravel insulation;

- Pipeline supports must always be 5' even when caribou migrations are not affected.

CASE STUDY NO. 3

ACCESS TO DRILL SITES 16 and 17

Summary

In May 1979, ARCO Alaska, Inc. submitted an application for a Section 404 permit to construct two new drill sites, access roads, construction pads, and pipelines as part of the Prudhoe Bay Unit development east of the Sagavanirktok (Sag) River. Alaska Department of Fish and Game (ADF&G) and the United States Fish and Wildlife Service (USF&WS), through comments to the Corps of Engineers, stipulated that ARCO Alaska mitigate certain perceived environmental effects concerning the central caribou herd.

Although sought through numerous discussions with the state and federal agencies, ARCO Alaska, Inc. was unable to obtain substantiation of the claims of potential adverse affects on caribou. The poorly substantiated stipulations, however, were not dropped. ADF&G utilized its comment authority to the COE to mandate the mitigating measures deemed necessary after failing to get the Alaska Division of Minerals and Energy Management (DMEM) to stipulate the conditions (the established mechanism for addressing the state agency concerns).

Problems Illustrated

1. Unsubstantiated Permit Conditions
   Neither the ADF&G nor F&WS recognized any responsibility to support their position on permit conditions. The permit conditions were even rejected as unfounded by the DMEM, but because of the Section 404 mechanism they were applied to the Corps permit.

2. Delay
   Although officially the permit application required only four months from completed application to issuance, ARCO Alaska, Inc. was required to spend several months in preapplication negotiation prior to being allowed to submit an application which would be considered complete. The total permit time heavily impacted the decision to accept the permit conditions.

3. Duplication of Effort
   Review by both the F&WS and the AF&G required twice the effort by ARCO Alaska, Inc. The AF&G reviewed the project both through its authority with the DMEM and the Corps doubling its efforts and consuming agency resources. ARCO Alaska, Inc. had to meet with eight to ten different agencies to review the project under other permits.

4. Unrelated Permit Conditions
The F&WS/ADF&G permit conditioning included stipulations unrelated to the impact of the fill material on "Waters of the United States." Limiting drilling activity during certain seasons is an example of using the Section 404 permit as a general environmental control vehicle.

5. Abdicated Responsibility
The Corps failed to act to reconcile the differences between ARCO Alaska, Inc. and the resource agencies. Because of the pressure of delay ARCO Alaska, Inc. was forced to negotiate permit conditions with the agencies or face loss of the project.

Permit Process

In May 1979, ARCO Alaska, Inc. submitted applications for three permits for drilling pads, access roads and construction pads required to exploit Drill Sites 16 and 17. These three permits were:

- Department of Minerals and Energy Management Lease Operations Permit.
- Corps of Engineers Section 404 and Section 10 Permit.
- Coast Guard Permit.

The Alaska Department of Fish and Game (ADF&G) through its commenting authority to Department of Minerals and Energy Management (DMEM) recommended that the following stipulations be applied:

- No activity in the vicinity of the drill sites until August 15.
- Prohibition of construction until August 1 to accommodate caribou migration during insect harassment season.
- Pipeline [illegible] o be constructed during the winter pipeline constru[illegible] season.
- A 5' to [illegible]' clearance between pipes and the ground with the greatest clearance at drainages for caribou crossing.

The DMEM communicated these [illegible] osed stipulations to ARCO Alaska, Inc. who responded with docum[illegible] o [illegible] that a 3' to 4' "visual window" (pipe to tundra clearan[illegible] i[illegible] a the high cost of winter construction (because of lost [illegible] unjustified. In August 1979, the DMEM issued the lease [illegible] permit consistent with the rationale presented in ARCO Alaska, Inc [illegible] ment. By doing so it rejected the ADF&G assertions of environmental damage.

Failing to mitigate the perceived environmental harm by conditioning the lease operations permit, the ADF&G (with the U.S. Fish & Wildlife Service (F&WS)) used its commenting power on the Corps of Engineers' (COE) permit to request that the permit be conditioned with the following:

- Provide manned checkpoint at the east end of the Sag River Bridge from July 1 through July 10.
- Prohibit all non-essential vehicular travel.
- Provide records of vehicular travel to the ADF&G and the USF&WS upon request.
- With respect to the construction pads either:
    a. Eliminate construction pads and provide winter installation of pipelines;
    b. Build construction pads but prohibit all construction and drilling activity from July 10 through August 15;
    c. Eliminate the construction pad only for Drill Site 16 and install pipelines during the winter.
- Provide a 5' minimum clearance between the pad and pipelines for caribou migration (i.e., 8' above tundra).
- Maintain adequate drainage.
- Move Drill Site 16 one degree to avoid a beaded stream. Reorient.

Since four months had elapsed, ARCO Alaska, Inc. met with representatives of the ADF&G and the USF&WS as well as other interested commenting agencies with the intention of negotiating as rapidly as possible a set of permit conditions which would allow issuance of the permit. Since the September timing of the meeting was nearing the end of the 1979 construction season, additional delay would have increased the cost significantly. The permit was issued immediately upon ARCO Alaska, Inc. accepting the following permit conditions.

1. In lieu of the no construction and drilling requirements during the period, a sign and traffic counter to be installed on drill site access roads to limit traffic to the absolute minimum during the period July 1 through August 10.
2. A manned checkpoint to be installed 25 miles away on the Kuparuk River to limit traffic from July 1 thru August 10.
3. Pipeline construction pad to Drill Site 16 to be breached for 400 feet for caribou passage.

CHRONOLOGY OF EVENTS

DRILL SITES 16 & 17

2/20/79	DMEM Lease Operations application, one portion of which addressed drill sites, submitted for entire 1979 Prudhoe gravel works program.
4/24/79	DMEM approval received with no unusual stipulations.
5/18/79	DMEM Lease Operations permit submitted specifically for Drill Sites 16 and 17 drilling pads, access roads, and construction pads. The application for a temporary Sag River module crossing was also included.
5/21/79	Similar application submitted to COE and Coast Guard.
5/22/79	Meeting with concerned state and federal agencies to discuss the permit packages on Drill Sites 16 and 17.
6/19/79	ADF&G internal memo to DMEM recommended mitigation measures principally for the protection of the caribou herds.
6/21/79	Letter from ARCO Alaska, Inc. to DMEM questioned the basis for the stipulation recommendations.
7/12/79	USFWS comments to COE suggested similar but inconsistent permit stipulations to the ADF&G.
7/15/79	ADF&G letter to COE requested prohibition of activity on Drill Sites 16 and 17 prior to August 1, 1979.
7/24/79	AOGC met with agencies to discuss stipulations on Drill Sites 16 and 17.
8/14/79	Because the permit condition request was inadequately substantiated, the DMEM approved 5/18/79 Lease Operations application without ADF&G mitigation measures.
8/30/79	COE approved Drill Sites 16 and 17 pads and roads, but not construction pads.
8/30/79	ARCO Alaska, Inc. met with USFWS to discuss Drill Sites 16 and 17.
9/12/79	ADF&G internal memo to DMEM cited that joint meetings with USFWS resulted in compromise recommendations.
9/24/79	A memo from USFWS to COE cited the compromise alternatives.
9/24-9/25/79	An ARCO Alaska, Inc. meeting with ADF&G, ADEC, ADFLWM, ADMEM, Attorney General's representative, COE, USFWS, and NSB resulted in a negotiated compromise by which ARCO Alaska, Inc. would address in mitigation measures, most of which had been rejected by the DMEM, in exchange for an immediate issuance of the permit.
9/28/79	COE issues construction pad permit.

CASE STUDY NO. 4

KUPARUK PIPELINE

Summary

The Kuparuk Pipeline carries crude oil from the Kuparuk River Field in Alaska to the Trans Alaska Pipeline System. The crossing of rivers and placing of gravel on tundra subjected it to Corps of Engineers permitting authority. The U.S. Fish and Wildlife Service (F&WS) in the review required a number of permit stipulations. The memorandum contained no substantiation of the need for the permit conditions.

ARCO Alaska, Inc. requested documentation of the permit conditioning. Repeated requests received no response from the F&WS. After a year a letter was received stating that the F&WS had been busy. Another six months of requests were followed by a letter from F&WS providing the details of the permit process and referencing a bibliography ARCO Alaska, Inc. could review if interested in the basis for the F&WS stipulations. A review of that bibliography failed to support the F&WS recommendations and in some cases refuted their conclusions.

Problems Illustrated

1. Lack of Accountability
   The environmental value of the permit conditions required by the F&WS was questionable. ARCO Alaska, Inc., however, was never able to understand the bases for the conditions since those bases were never provided. Eighteen months of attempting to obtain the information were fruitless. The two letters ARCO Alaska, Inc. did receive implied that the F&WS did not consider substantiation of their recommendations necessary or high priority.

2. Jurisdiction
   Most of the mitigation measures involved protecting the central caribou herd. The caribou are adequately protected by the Alaska Fish and Game and the additional oversight by the F&WS was a duplication of effort providing little environmental benefit.

3. Economic Considerations
   The suggested mitigation measures were costly and appeared highly speculative. The F&WS's recommended added stipulations (without documenting verifiable environmental benefit) varied from comment to comment as they reviewed the project through the different lines in the review network. The approach was confusing and ARCO Alaska, Inc. could not tell from the information supplied whether the cost of the suggested mitigation measures was justified by a benefit to the environment or an arbitrary waste of operational and monetary resources.

4. Unrelated Permit Conditions

The permit conditions suggested by the F&WS were not related to the water quality of either the wetlands or the Kuparuk River. The mitigation of disturbance to the fish or caribou migration is not appropriate or required by the Clean Water Act. This use of Section 404 is a conversion of a water quality permit into a vehicle for general environmental control.

Permit Process

Corps of Engineers permit was required for the proposed Kuparuk Crude Pipeline. As a part of the application process, various state and Federal agencies have the right of review. The F&WS, one of these agencies, raised several questions regarding the environmental impact of the project and related development. They suggested a number of expensive mitigation measures considered appropriate in a one and one-half page letter from Jerry Stroebele to Colonel Nunn (February 22, 1980). (Attached). Among these questions and suggested stipulations were the following:

- The suggestion that the pipeline follow an alternate route;
- No construction be allowed between May 15 and August 15;
- The pipeline maintain a 5' minimum clearance;
- Fish overwintering areas be protected.

These suggestions were made without documentation supporting the adequacy or defining necessity of the mitigation. Because ARCO Alaska, Inc. was unaware of any documented bases for the requirements, in a letter to Jerry Stroebele (March 25, 1980) the Company requested an explanation of the proposed permit conditions and the supporting documentation.

When no reply was received, ARCO Alaska, Inc. repeated its request in a memorandum on May 21, 1980. ARCO Alaska, Inc. repeated its request in letters and by phone numerous times during the next year with no response from the F&WS. The first response (Monson to Hellstrom April 24, 1981), stated that the Service had failed to respond earlier because of time pressures. Although the F&WS was willing to meet, there was no offer to document its bases for the permit conditions recommended.

Since an understanding of the background to the permit conditions was critical to a fruitful meeting, ARCO Alaska, Inc. declined the meeting and continued to request a written response to the questions. A final letter from Melvin Monson (October 22, 1981) responded to the requests by providing a detailed account of the permit procedure and identifying 500 to 1,000 pages of resource material ARCO Alaska, Inc. could review to provide background to the suggested stipulations. The referenced material was general in nature. It was difficult to tie the F&WS rationale for selecting the specific mitigation measures to the literature cited.

One of the references directly contradicted one of the permit stipulations suggested. Munson referenced a Banfield, et.al.* report on issues concerning caribou and North Slope petroleum development in support of the recommended permit conditions. The report directly refutes the need for the 5' clearance between the pipeline and the gravel pad. The research reported found that caribou passage should not affect engineering design since they are as likely to jump a 3' pipeline laid on the ground as crawl under one supported 5' above the pad.

By the time Monson responded, the permitting process was complete. ARCO Alaska, Inc. dropped the effort to obtain justification of these particular permit conditions; however, the issues associated with the conditions remain unresolved and continue to affect development on the North Slope.

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*Banfield, A.W.F., R. D. Jakimchuk, R. D. Cameron. 1981. An Assessment of issues concerning caribou and North Slope petroleum development, Caribou Advisory Panel Final Report.

CHRONOLOGY OF EVENTS

KUPARUK PIPELINE

11/26/79	Permit Application for Section 404 permit submitted to the Corps of Engineers.
2/22/80	Stroebele of the U.S. Fish & Wildlife Service (F&WS) communicated concerns and suggested permit conditions to Corps.
3/5/80	ARCO Alaska, Inc. submitted minor modifications to permit application.
3/25/80	ARCO Alaska, Inc. requested, in a memorandum, documentation of the F&WS permit concerns and suggested stipulations.
4/21/80	COE Permit Issued but discussion of permit conditions continued during project modification permit review.
5/21/80	Requests repeated in writing when no response was received from F&WS.
5/21/80-1/28/81	A number of attempts made to acquire the substantiation for the permit conditions.
12/8/80	Memorandum from USF&WS to U.S. Coast Guard stipulating similar conditions be placed on the Coast Guard permit.
1/28/81	ARCO Alaska, Inc. reiterated its request for substantiation in writing to Keith Bayha.
2/18/81	ARCO Alaska, Inc. negotiated relief from some of the permit conditions placed by the USF&WS.
4/24/81	First response from the F&WS - A memorandum apologizing for delay and expressing a willingness to meet on the issues. No clarification or justification of permit stipulations was provided.
4/24/81-9/4/81	Additional attempts to obtain the information.
9/4/81	ARCO Alaska, Inc. reiterated its request in writing to Keith Schreiner, Regional Director, USF&WS for Alaska.
10/22/81	Monson responded to ARCO Alaska, Inc. requests with a memorandum delineating the permit process and referencing a bibliography from which the F&WS reached their conclusions.

CASE STUDY NO. 5

KUPARUK RIVER BRIDGE

Summary

The Kuparuk River Bridge in Alaska required approval of several state and federal agencies (one of which was the Corps) and the local North Slope Borough. These agencies, in turn, sought the advice of additional agencies and departments through a multiple channel handling complex resulting in several reviews by most agencies. Two separate thirty day public comment notices and two surveys of local residents and subsistence users were required.

ARCO Alaska, Inc. initiated formal permitting for the river crossing in the first half of 1979, after almost 1-1/2 years in the informal review process. Alaska Department of Fish and Game requested ARCO Alaska, Inc. accelerate the development schedule to prevent construction during the caribou migration and heavy insect infestation. The company complied by completing design and accelerating order and delivery of materials.

Channel crossings were not completely approved because of changing governmental requirements and intra-agency inconsistency, causing loss of the 1979 construction season. These delays resulted in ARCO Alaska, Inc. having to move all supplies and equipment, delivered early because of ADF&G request, out of the flood plain before break-up 1980, and back after break-up to continue construction.

Problems Illustrated

1. Redundant Review
During permitting the ADF&G reviewed the bridge permits four separate times through various channels. Each of the agencies reviewing the Section 404 permit were required to review the project at least one additional time to fulfill other permit obligations.

2. Delay
The official time from the initial Corps submittal to final permit issuance was 11 months; however, if the informal review time is considered, almost two and a half years were required from the initial presentation of the project to the federal and state agencies to the final issuance of the Corps permit.

3. Economic Considerations
The ADF&G significantly increased the cost by requiring ARCO Alaska, Inc. to order the materials for rapid bridge construction then delaying the permitting resulting in substantial cost to ARCO Alaska, Inc. with no resulting benefit to the environment.

4. Abdicated Responsibility - Reviewing Agency Veto. During permitting a disagreement arose between ARCO Alaska, Inc. and the ADF&G concerning construction completion dates. Rather than mediate the issue, the Corps refused to issue the permit unless the ADF&G was satisfied forcing ARCO Alaska, Inc. to reconcile the issue to keep the project alive.

Permit Process

To build the Kuparuk Bridge, ARCO Alaska, Inc. required approval of several state and federal agencies and the local North Slope Borough. These agencies in turn sought the advice and review of multiple additional agencies and departments through numerous channels of handling. Two 30-day public comment notices and two surveys of local residents and subsistence users are required. A diagram showing the matrix of review channels is attached as Figure 4-1. It can be noted from the diagram that each agency commenting on the Corps of Engineers permit had the responsibility to comment on at least one other permit.

ARCO Alaska applied for a Corps of Engineers Permit for construction of a bridge over the West Kuparuk River on the North Slope of Alaska after approximately eighteen months of preapplication negotiation and design review with the various commenting agencies. The Alaska Department of Fish and Game suggested that ARCO accelerate the construction schedule to avoid the caribou migration and heavy fly infestation period from July 1 to August 15.

After consultation with the appropriate representatives of all concerned state and federal resource agencies, ARCO completed design and accelerated order and delivery of materials. In altering the construction schedule to comply with the ADF&G request, ARCO incurred the following additional costs:

- Early commitment of engineering manpower and technical resources.
- Delay in other projects preempted by the bridge design.
- Acceleration in fund commitment for construction materials and premiums for shorter delivery schedules.

During the permit review, the bridge was redesigned because of agency comments. Each modification magnified the costs since it resulted in a shop change order or rendered unusuable equipment already fabricated.

The center section (referred to as main channel crossing in chronology) received approval prior to east and west channel crossings. The two end sections were not approved because of both changing governmental requirements and intra-agency inconsistency. The agencies involved had previously committed to expediting the permit process so that ARCO could respond to the ADF&G request for accelerated construction. Once the agencies agreed on redesign the actual construction was delayed because ARCO Alaska had justifiable concerns about the safety of the final design.

Center section construction commenced Fall 1979 while negotiation for the east/west channel crossings continued. Because subfreezing temperatures are encountered from October onward and permit approvals for east/west channel crossings were delayed, the most efficient part of the 1979 construction season was lost. The delay resulted in ARCO Alaska having to move all supplies out of the flood plain before break-up 1980, and moving them back in the flood plain after break-up.

ADF&G and the United States Fish and Wildlife Service (USF&WS) required construction of the east/west crossings to be completed before break-up 1980 as a condition of permit approval. This was impossible because of redesign. ARCO Alaska, Inc. entered into negotiations with the wildlife agencies on the timing of construction since the COE would not issue the permit until the difference with the wildlife agencies was resolved.

Before total approval was received for the east/west crossings, the center section (main channel crossing) of the bridge failed June 9, 1980, and the project was abandoned.

CHRONOLOGY OF EVENTS

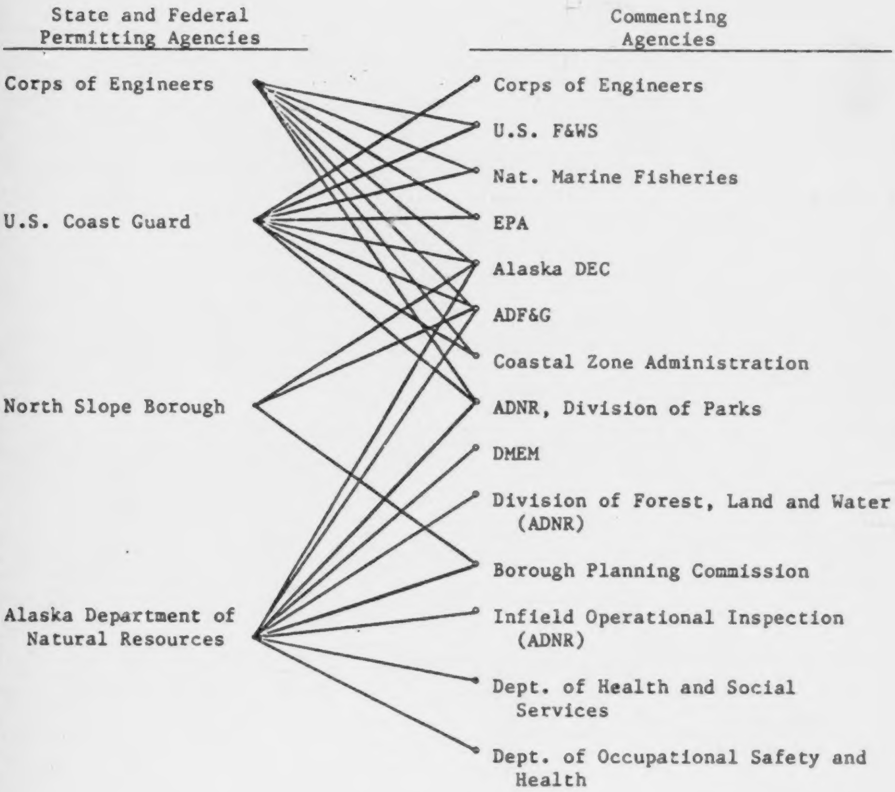
KUPARUK PERMANENT RIVER CROSSING

12/15/77	Informal plans for utilizing ARMCO multiplate superspan culverts for a permanent Kuparuk River crossing sent to AF&G, ADEC, ADL, and DMEM.
2/8/78	Conceptual approval received from ADF&G.
2/7/79	Project formally presented to all State and Federal agencies of the Kuparuk Project. (Direct reference model plans for 1980 river crossing.)
4/30/79	State Miscellaneous Land Use Permit required soil sampling of Kuparuk River.
5/9/79 A.M.	Project plans formally presented to all State and Federal agencies with supporting hydrological data for a multiplate superspan permanent crossing of the Kuparuk River in spring/summer 1980.
5/9/79 P.M.	During a meeting with ADEC, ADL, ADF&G, and USFWS, concerning Drill Sites 16 and 17, ADF&G suggested that in order to accommodate the caribou insect relief season (July 1 - August 15) construction commence August 15, 1979. All agencies pledged their assistance to expedite permit processing to allow a 8/15/79 commencement.
5/10/79	Company management decided to accommodate agency's request.
5/23/79	Kuparuk River Crossing package of information sent to NSB.
6/1/79	Permit applications were filed with the Coast Guard, Corps of Engineers, DMEM and ADEC.
6/29/79	Additional hydrological data submitted to agency, satisfying their concerns over the channel plug impact on Prudhoe Unit operators resources in the Kuparuk dead arm.
7/13/79	East/West channels plans upgraded, amendments sent to Coast Guard, Corps of Engineers and DMEM.
7/19/79	ADF&G Title 16 approval received.
8/6/79	ADEC Section 401 Certificate of Reasonable Assurance received.
8/7/79	ADL stipulation required letter of non-objection from West Side operator and lessee of record.
8/9/79	Meeting with NSB resulted in a letter agreement and stipulation resolving their problems

8/16/79	USFWS objected to project based on inadequate erosion control and provisions for fish passage (this followed an unsuccessful meeting on 8/15/79 with USFWS).
8/17/79	ARCO, USFWS and Corps of Engineers met to resolve objections. Alternatives were discussed and redesign considered, but no resolution reached.
8/20/79	Coast Guard permit approval received.
8/21/82	USFWS and Company met and negotiated a settlement which included splitting the permit into main and East/West Channel packages.
8/24/79	DMEM lease operations permit approval received.
8/27/79	Corps of Engineers approval received for main channel, 8/21/79 stipulations included for East/West channels.
9/5/79	Redesign of East/West channels presented to USFWS. Conceptual approval received.
9/20/79	East/West channel amendments submitted to Corps of Engineers, Coast Guard, DMEM and ADF&G (Title 16).
10/11/79	ADEC Certifies Section 401 permit for East/West channels.
10/16/79	Corps of Engineers requested minor modifications to exhibits of 9/20/79 amendments package.
10/17/79	Modified drawings resubmitted to Corps of Engineers
10/19/79	Corps of Engineers issued 30-day public notice for a new permit for East/West channels.
10/22/79	Company letter to Corps of Engineers addressed the fact that modification of East/West channels was a stipulation of 8/27/79 permit and should not require a new permit.
11/6/79	Coast Guard approval for East/West channels received.
11/7/79	DMEM approval for East/West channel received with AF&G stipulation that construction be completed by break-up 1980.
11/13/79	Letter sent to DMEM stating it was improbable the project could be completed by break-up 1980.
11/14/79	Letter from Corps of Engineers transmitting AF&G comments including stipulation that construction be completed by break-up 1980.

11/19/79	Company letter sent to Corps of Engineers regarding ADF&G stipulation that construction be completed by break-up 1980. Letter stating it was unlikely project could be completed by break-up 1980.
11/19/79	Letter from Corps of Engineers transmitting USFWS comments including stipulation that construction be completed by break-up 1980.
11/21/79	Company letter sent to Corps of Engineers regarding USFWS stipulation that construction be completed by break-up 1980 repeating the fact that it was unlikely project could be completed by break-up 1980. Corps would not issue permit until issue was resolved.
12/13/79	Letter to ADF&G from Corps of Engineers informed them of ARCO's position and requesting their comment.
12/20/79	Letter from ADF&G to Corps of Engineers requested that the permit be held in abeyance until an agreement is reached and suggested a January 7, 1980 meeting between ARCO and ADF&G.
3/18/80	Company submitted a letter to Corps of Engineers in response to ADF&G December 20, 1979 letter. Letter states since completion of the project was impossible prior to break-up 1980, the following solution was proposed: 1. Construct temporary detours in the east and west channels, using ten each, 48" smooth pipe culverts between caribou calving and insect season (June 20 - July 10). 2. Commencement of permanent construction was proposed for August 15, 1980. This proposal would allow the transport of the Kuparuk modules, as scheduled, and avoid construction during the caribou "insect harassment" period.
4/8/80	Company submitted letter to DMEM proposing same solutions.
4/15/80	ADF&G letter to DMEM expressing no objection to the proposed East/West channel solution.
4/23/80	Corps of Engineers approval received for East/West channel crossings. Stipulations included proposed solutions of 3/18/80 letter.
5/2/80	Company letter to AF&G providing a preliminary construction schedule for both the temporary and permanent East/West channel crossings.
5/9/80 - 6/12/80	Failure of the main channel crossing. An alternative means of transporting modules across the Kuparuk River was required.

KUPARUK BRIDGE PERMIT REVIEW MATRIX


State and Federal Permitting Agencies
Commenting Agencies
Corps of Engineers
U.S. Coast Guard
North Slope Borough
Alaska Department of Natural Resources
Corps of Engineers
U.S. F&WS
Nat. Marine Fisheries
EPA
Alaska DEC
ADF&G
Coastal Zone Administration
ADNR, Division of Parks
DMEM
Division of Forest, Land and Water (ADNR)
Borough Planning Commission
Infield Operational Inspection (ADNR)
Dept. of Health and Social Services
Dept. of Occupational Safety and Health

Resource Development Council
for Alaska, Inc.
444 West 7th Avenue, Anchorage, Alaska 99501
Box 516, Anchorage, Alaska 99510 - 907/278-9615

Testimony of Darlene Ruiz,
Attorney, Pacific Legal Foundation
on behalf of
The Resource Development Council, Inc.
on
Section 404 of the Clean Water Act
before the
U.S. Senate Committee on Environment
and Public Works
July 8, 1982

My name is Darlene Ruiz. I am an attorney employed by the Pacific Legal Foundation and appearing before you on behalf of our liaison office, the Resource Development Council.

Pacific Legal Foundation is a nonprofit, tax-exempt, public interest organization with over 17,000 members, contributors, and supporters located throughout the country, with legal offices in Sacramento, California, and Washington, D. C.

Since its establishment in 1973, PLF has actively engaged in research and litigation over a broad spectrum of public interest issues. PLF advocates a balanced approach in dealing with public interest issues, and supports the concept that governmental decisions and policies should reflect a careful assessment of the social and economic costs and benefits involved. PLF has especially stressed this approach in the area of land use regulations, and environmental issues.

One of the basic philosophies of PLF is that governmental intrusions into the lives and affairs of the

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public should be reduced to the greatest possible extent by eliminating unnecessary regulations which impose great burdens while producing little or no benefits. In this regard, PLF is of the view that governmental decision making and policy making in environmental issues should follow a "common sense" approach and reflect concerns for the economy, employment, property rights, the general welfare of the public, and a rational interpretation and application of the laws, as well as environmental concerns.

In short, PLF advocates a broad view of the public interest and seeks to insure that balance and common sense are the bases on which laws and regulations are established, interpreted and administered.

It is precisely this concern for a rational balanced and common sense approach to the establishment, interpretation and application of laws and regulations which has caused PLF to actively participate in the Presidential Task Force on Regulatory Relief amending regulatory provisions of the Clean Water Act, Section 404 as well as its multitudinous and attendant regulation over dredging and filling activities in the waters of the United States.

The number of state and federal agencies testifying today is evidence of the overlapping as well as competing interests of administrative agencies seeking to tie down or obtain jurisdiction over wetlands without any congressional definition of wetlands and without the benefit of expressed goals and objectives in wetland protection.

The regulation of wetlands has grown like a hybrid, far removed from the seed of legislative intent that sought to protect the navigable waters of this country. Instead of seeking to improve the quality of navigable waters, agencies have raced to increase their jurisdictions through expansion of the definition of wetlands with little concern for the effect upon regions or the impact upon individual freedoms and property rights of citizens. Where definition has failed to serve the purposes of agency encroachments, the mire of procedural manipulations has worked to the benefit of the agency without regard for the detriment to property owners.

The mire of regulations affecting Alaska residents includes:

National Environmental Policy Act of 1969, as amended NEPA
Rivers and Harbors Appropriations Act of 1899 (Refuse Act)
Federal Water Pollution Control Act Amendments of 1972, as amended 1977 (Clean Water Act)
Coastal Zone Management Act of 1972, as amended 1976
Marine Protection, Research and Sanctuaries Act of 1972
Wild and Scenic Rivers Act
Protection of Wetlands, Executive Order No. 11990 dated May 24, 1977
18 AAC 70 (Alaska Water Quality Standards)
Alaska Coastal Zone Management Act

The agencies involved in interpreting, regulating and commenting upon an applicants proposed project include:

Environmental Protection Agency
U. S. Army Corps of Engineers
Dept. of Interior, Fish and Wildlife Service

Dept. of Commerce, National Marine Fisheries Service

Alaska Department of Fish and Game

Alaska Department of Environmental Conservation

Alaska Department of Natural Resources

Alaska Division of Policy Development & Planning

Alaska Office of Coastal Management

Additional federal agencies with wetlands jurisdiction include:

Department of Agriculture

Forest Service

Soil Conservation Service

Heritage Conservation and Recreation Service

National Park Service

Bureau of Land Management

Office of Water Research and Technology

Bureau of Reclamation

U. S. Geological Survey

This proliferation has resulted in the inequities, confusion and frustation just expressed in testimony by the preceding witnesses. Only legislative changes can halt the growth of agency concerns over property never intended for regulation.

A. Jurisdiction must be centralized in one agency

Competing claims of agencies fearful of lost jurisdiction must be put aside and regulation over dredging and filling in navigable waters should be fully centralized in the Army Corps of Engineers.

Regulations promulgated by the Corps should be accomplished through executive statement of goals and objectives governing wetlands, without reference to the jurisdiction held by existing agencies. Such a statement of goals and objectives may then be used as a concrete standard by which significant wetlands could be identified. The current vaguaries and ambiquities surrounding the definition of wetlands may represent full employment for consultants and attorneys but the cost to be borne by individual property owners is staggering.

The importance of identifying and regulating only significant wetlands would serve more than the purpose of clarity; it would provide citizens with due process. Notice could be given to all interested persons that significant wetlands were to be identified. The opportunity to be heard and to present competing evidence and testimony would provide some recognition of the due process rights ignored under current regulation. Further, the opportunity for regional and local input into the determination would provide balancing data for the Corps to weigh in determining the significance of wetlands.

B. Section 404 is not a wetland preservation statute

The fact is that section 404 is intended to control the discharge of dredging or fill material and is not a wetland preservation statute. Its sole purpose was to control discharge of two types of pollutants into the nation's waters. Only case law has expanded the Corps' authority to regulate the deposit of dredged or fill material into a wide variety of wetlands. The only reference in federal legislation is an oblique one to wetlands dredge and fill activities found in the 1977 amendments to the Clean Water Act.

The Corps' 404 permit program attempts to expand the original purpose of the act by purporting to protect wetlands while using the permit process to regulate land use. The ultimate effect of the vague protectionist approach to wetlands has resulted in governmental taking of private property. The enormity of the taking is made all the more dramatic by the vast geographic areas currently regulated by the Corps.

C. Permitting procedures must be focused on the benefit/burden to the property owner

The wetlands review by the Corps starts with the presumption that "wetlands are vital areas that constitute a productive and valuable public resource, the unnecessary alteration and destruction of which should be discouraged as contrary to the public interest." 33C.F.R. 320.4(b)(1)

The burden of overcoming the presumption is on the property owner who can overcome the presumption only if "clearly demonstrated otherwise." 40C.F.R. 230.10(1981)

The presumption in favor of the importance of wetlands must be eliminated with greater emphasis being given to property rights of the individual. The applicant must be permitted an opportunity to fully challenge the conclusions of the objecting agency. There must be some provision for awarding of costs if an agency is found to have objected to a project without adequate foundation or documentation of its conclusions. Mere assertions that a project might endanger ecosystems would be deemed insufficient.

The recent amendments made by the Army Corps of Engineers are akin to a cool breeze on a hot afternoon, but cannot and should not be characterized as the final solution to the regulatory mire described by witnesses today. Further, efforts to define and streamline the 404 permit process are necessary to produce the kind of balanced approach to wetland regulation that was expected by Congress. The first positive steps toward balancing of human concerns versus wetland concerns have been taken and must continue. The future development of Alaska depends on it.

Thank you.

TESTIMONY FOR U.S. SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

Anchorage, Alaska
July 8, 1982
By
Angie Dugick, Development Manager
Quadrant Development Company

My name is Angie Dugick, and I am the Development Manager for Quadrant Development Company. We are a local land development firm and currently have approximately 2,000 acres in various stages of development in the Anchorage Bowl.

Having been involved in real estate development in Anchorage for the past seven years and in the wetlands process for the past year and one-half, I wanted to share some of my experiences and insights with you today. Quadrant has applied for and received six wetlands permits and has several currently being processed.

We at Quadrant are very supportive of the wetlands planning which has been in process in Anchorage for the past two years. The general permit for Anchorage which will soon be issued by the Corps of Engineers is a goal towards which an extremely diverse and dedicated group has been working for a long time. The development of the Anchorage Wetlands Management Plan is the first time I have seen such diverse interests and viewpoints come together and work out a viable solution. Some of the more traditional, conservative developers fought the wetlands plan. They still feel that the federal law takes away their private property rights without compensation. It was very difficult to explain to my management why we were siding with the state and federal resource agencies, environmental and other public interest groups against a portion of the development community. On the surface, it was an unholy alliance. However, all these diverse interests were working towards common goals - to preserve critical wetlands while not unduly impeding the development process and private property rights and to lay the framework for future decisions regarding wetlands in Anchorage. An understanding was developed by the agencies of property owners' and developers' concerns and problems, and developers began to understand that wetlands do have values - that they are not merely construction and permit problems that need to be overcome. Our experiences while working on the plan were very positive and provided the basis for ongoing cooperation with all parties involved. The efforts of the Wetlands Advisory Committee - and particularly its chairman, Wayne Pichon - should not go unrecognized. Mr. Pichon continually sought the common ground essential to making the difficult compromises involved in obtaining the ultimate consensus. The Municipality of Anchorage should also be complimented on its progressive and far-sighted attitude in buying all the parties together.

Our first recommendation to you would be to encourage the use of general permits in all areas where wetlands are problems. Regulations which constrain or discourage the development of general permits should be removed - and possibly there can be regulatory changes which would provide incentives to go through the difficult and time consuming process of obtaining a general permit. The very process of developing a wetlands plan can generate the cooperation and goodwill needed to make ongoing regulatory decisions.

Although many of the wetlands "problems" in the Anchorage area have been resolved through adoption of the Anchorage Wetlands Management Plan, there remain several areas of concern in local permitting, as well as some state-wide issues which need to be resolved.

Anchorage contains over 362,000,000 acres of land. For perspective, Anchorage contains only about 600,000 acres, or 0.2 percent. Of the more than 362,000,000 acres in Alaska, only about 1,000,000 are privately owned. The remainder are the property of Federal, State, and local governments, and Native Corporations. Even within the 600,000 acres in Anchorage, a substantial part of the land is owned by the Federal, State and City governments. Much of the remaining land is undevelopable due to steep slopes, lack of utility infrastructure, and of course, wetlands.

Anchorage is in a very confined geographic basin and there is a shortage of developable land in private ownership. This land shortage has resulted in residential raw land prices of from $30,000 to over several hundred thousand dollars per acre, (depending on zoning and proximity to utilities). A new single family detached lot of approximately 6-10,000 square feet with public utilities in an Anchorage subdivision cannot be purchased for under $35,000. The average price tends more towards the mid-$40,000 price range. The shortage of privately owned land suitable for development in Anchorage and in the rest of the state must be borne in mind when considering wetlands issues. Surely it was never the intent of the wetlands legislation to price people out of housing or expropriate land from private ownership. It would indeed be unfortunate if a substantial portion of the 1,000,000 acres of privately owned land in Alaska turns out to be "critical" wetlands when there are 361,000,000 other acres which can provide many of these wetlands values. In Anchorage, the recognition of the severe land shortage precipitated some of the compromises which evolved. We would recommend that wetlands regulations be revised to address similar situations in other areas of the state and the rest of the United States.

Another Alaska-wide problem is ground water conditions which create "technical" wetlands, but not the type of coastal and other wetlands which the original legislation was designed to protect. Other areas of the country may have similar problems with conditions which cause areas to be classified as wetlands through strict adherence to the technical definitions, although these types of areas were never intended to be accorded the strict protection of the law.

Another problem unique to Alaska is the extremely short construction season. Due to the severity of the cold, subdivision and road construction cannot begin until May, and sometimes June. In addition, due to the early onset of extreme temperatures, construction must end sometime in October when the ground begins to freeze. Regulatory delays are always burdensome and expensive, at best. With our construction constraints, they become intolerable. For example, the Corps is often unable to make a definitive wetlands determination until the snow and ice have melted - sometimes in May or June. Our experience is that the typical time span between the submission of an application until issuance of a wetlands permit ranges from 4 to 6 months (we had one permit require almost 18 months). Since a determination cannot be made until spring, the long regulatory process causes us to miss the entire construction season. It is often not possible to seek wetlands determinations in the prior fall, which would be the ideal procedure, since our development activities are determined by market conditions which are beyond our control. However, missing the entire construction season means that we may have missed our target market, and has provided an impetus for some developers to proceed without obtaining necessary permits. We would hope that you would enact whatever regulatory changes it is in your power to make, to expedite the process of obtaining a permit. Even though many of the wetlands problems in Anchorage have been addressed in the locally adopted plan, there are still areas which will not be governed by the forthcoming general permit. Permits for these areas should be issued expeditiously so that local housing needs can be met in timely manner.

One final concern of ours that applies to all property owners involved in wetlands areas. Individuals within the various agencies are often called upon decisions which are basically judgement calls. These decisions fall in the gray areas of the technical definitions and regulations. Property owners often fall victims to the bureaucracy when such a "judgement call" goes against them. I am not talking here about properties which are obviously wetlands, where expensive mitigation measures are required, etc. The law is quite clear that there are public interest values which justify the preservation of these wetlands. However, there are a lot of "close calls". Many individuals in such a situation do not have the resources that my company has to pursue and appeal such decision. You may wish to give some thought to regulatory provisions which would encourage administrators and interpreters of the regulations to be more even-handed in their judgement calls - perhaps even leaning towards the property owner's perspective. For instance, compensation to individuals for their expenses, cost of development delays, etc., when a bureaucrat makes an incorrect determination regarding the property which is subsequently reversed on appeal.

In this same vein, the subject matter of wetlands determinations and permit conditions should be limited to the direct effects of the discharge of dredged or fill materials. Permit conditions should not be allowed which affect matters other than the placement of fill materials; for instance, activities which will be subsequently conducted in the filled areas should not be subject to permit conditions. The permit which took us 18 months to obtain is an example of agencies being more concerned with secondary effects of future development, rather than a problem caused by the wetlands fill itself; i.e., the effect of a future road and its traffic from a proposed development on the wild life was given more weight than the minimal disruption of habitat which would occur through the fill.

In summary, the wetlands process in Anchorage is working very well due to the cooperation and open-mindedness of those involved. Our suggestions are for your consideration for further improvements in the system. I very much appreciate your holding hearings in Anchorage so that we could share these ideas with you.

Thank you.

901 COE

NORTHWEST ALASKAN PIPELINE COMPANY

1120 20th St., N.W. Suite S-700
Washington, DC 20036
(202) 872-0280

GOA-82-1083

July 7, 1982

Mr. Jim J. Tozzi
Deputy Administrator
Office of Information and
 Regulatory Affairs
New Executive Office Bldg.
17th & Pennsylvania Avenue, N.W.
Washington, D.C. 20503

Re: Transmittal of Background/Position Paper on U.S. Army Corps of Engineers Section 404 Permits

Dear Mr. Tozzi:

In response to your request during our telephone conversation of May 12, 1982, enclosed is a Background/Position Paper dated July 2, 1982, on the Northwest Alaskan Pipeline Company's (NWA) involvement with the Corps of Engineers (COE) and other Federal and State agencies in Alaska regarding acquisition of FWPCA Section 404 permits necessary for the construction of the Alaska Pipeline segment of the Alaska Natural Gas Transportation System (ANGTS). We understand that this has been requested incident to your review of the overall functioning of the Section 404 permitting process.

The Background/Position Paper and its accompanying Chronology reveals the extended period of time we have been working with the government to develop a permitting strategy. This long process has produced draft permits that now, upon examination of the general and special conditions attached thereto, are unacceptable. In addition, we now face the prospect of needing over 250 individual Section 404 permits to construct the pipeline in the interior of Alaska. Do not, however, conclude from this chronology of our experience that we have reached an impasse or that we will, in the end, be unable to resolve our permit concerns. We remain confident that further discussions with COE and the Office of the Federal Inspector (OFI), and a cooperative attitude of their representatives, will lead to a satisfactory outcome. It is the process itself that we have attempted to emphasize in accordance with your request. An advance copy of the enclosed position paper has been given to the OFI. The OFI response, which provides additional background on the viewpoints and objectives of the agencies participating in the development of the draft General Permits, is being forwarded separately. The basic cause of the unfortunate situation that exists, as described above, appears to NWA to have two aspects, as follows:

A SUBSIDIARY OF NORTHWEST ENERGY COMPANY

(1) agency officials view the law and regulations in a restrictive manner that does not appear to represent the intent of Congress and (2) the Section 404 permitting process affords agency officials a readily available and virtually open-ended opportunity to impose discretionary terms and conditions that may be of interest to those agencies.

Regarding your concern for regulatory reform, we have had the opportunity to review the recommendations of the American Petroleum Institute (API) for improving Section 404 regulations contained in API's letter of February 4, 1982, to the Vice President of the United States, a copy of which was also provided to Mr. C. C. Demuth, Office of Management and Budget. API proposed a revised Section 404 regulatory program with 13 major features. The following program attributes would have been of direct benefit to the Alaska natural gas pipeline project.

- a Corps-administered procedure incorporating prescribed time limits and final decision-making at the District Engineer level.
- elimination of permit stipulations from other agencies.
- a substantial expansion in the use of General Permits.
- a redefinition of wetlands.

Adoption of these changes, as a minimum, is strongly endorsed by NWA.

As for our permit needs, we intend to conduct discussions with the COE along the lines of greater applicability of nationwide permitting for construction of ANGTS in Alaska. Perhaps in this manner we can improve upon our Section 404 permitting and simplify compliance.

Please do not hesitate to let me know if we can be of any further assistance.

Yours truly,

NORTHWEST ALASKAN PIPELINE COMPANY

Edwin Al Kuhn

Edwin (Al) Kuhn
Director
Governmental Affairs

EAK/rlc
Enclosure
cc (w/enc): Hon. John T. Rhett, Federal Inspector
Amos Mathews, Deputy Fedeal Inspector, Alaska

7/7/82

NORTHWEST ALASKAN PIPELINE COMPANY
BACKGROUND POSITION PAPER

TOPIC: U.S. Army Corps of Engineer permits issued pursuant to Section 404 of the Federal Water Pollution Control Act (FWPCA).

ISSUE: The sponsor of the Alaska pipeline segment of the Alaska Natural Gas Transportation System (ANGTS), the Northwest Alaskan Pipeline Company (NWA), must obtain Section 404 permits for construction of the gas pipeline across "wetlands" in Alaska. The Federal regulatory framework established specifically for the ANGTS delegates construction oversight authority to the Office of the Federal Inspector (OFI). Section 404 permits, among many other permits required for ANGTS construction, are subject to OFI oversight and enforcement. The Alaskan District Engineer, U.S. Army Corps of Engineers (COE) has proposed Section 404 General Permits which:

- fail to fully utilize OFI's coordination and enforcement authority
- contain terms and conditions that are additive, redundant or sometimes modifications of requirements in other regulatory permits or the Federal Right-of-Way (ROW) grant.
- impose a special categorization of wetlands, applicable only to ANGTS which restricts applicability of Section 404 General Permits.
- authorize fewer construction activities than requested, thereby increasing the anticipated number of individual Section 404 permits from roughly 60 to over 250 in Alaska.

BACKGROUND: The Alaska gas pipeline project was authorized by the Alaska Natural Gas Transportation Act (ANGTA) and implemented by the "President's Decision and Report to Congress" of September 22, 1977 (hereafter the President's Decision). Reorganization Plan No. 1 of 1979 gave the OFI responsibility for enforcing all Federal statutes, regulations and permits. The basic permitting authority was, however, retained in the various departments and agencies, but was made subject to "coordination" by OFI. Subsequently the U.S. Department of the Interior issued a Federal ROW Grant, including over 200 special stipulations, which provide the technical and environmental parameters for design and construction of the ANGTS and implement in detailed language the more generally stated terms and conditions in the President's Decision.

Within the special regulatory framework established by law for the ANGTS is the requirement to process permit applications in an expeditious and cost effective manner. Accordingly, NWA proposed that the COE issue General Permits for specified types of construction activities recurring at numerous locations along the length of the pipeline. Under this proposal, the General Permits would delegate final responsibility for approval of site-specific design and construction plans to the OFI, to be handled in the normal course of OFI's mandated design and construction oversight role. Thus, the COE would have issued General Permits, deferring design and construction compliance to the OFI. Subsequent authorizations for field changes also could have been addressed in the field by the OFI in its oversight role.

DISCUSSION: In two and one-half years of attempting to establish a viable permitting approach with the COE for a FWPCA Section 404 permit for wetlands in the pipeline corridor, a consensus has still not been reached. The COE and many of the other agencies appear to view their permitting role as an independent regulatory process separate from ANGTA, the President's Decision and the Federal ROW Grant rather than integrating their efforts in a complementary manner. In the spirit of cooperation necessary to fulfill the objectives and intent of Congress as outlined in the President's Decision, simplified permitting procedures should be used as much as possible; complex new, redundant permitting strategies should not be created.

The COE, in compliance with current regulations, is required to provide "notice" of proposed permits to a number of other agencies. Whereas the District Engineer has substantial authority to make final decisions in many instances, in practice permits are frequently developed that attempt to include all agency concerns.

As an example of the tendency for overlapping permit terms and conditions, the proposed COE

General Permits have a total of 72 general and special conditions--50 of these stipulations repeat, often in restated terms, those imposed by the Federal ROW grant, principally with respect to requirements for water quality, discharge of pollutants, threatened and endangered species, and impacts on wildlife and fisheries. It should be noted, too, that there is no significant difference in the level of detail in these conditions; i.e., the COE permit conditions are not substantially different from those used by other agencies. NWA is not suggesting that environmental protection requirements be relaxed or that any other legitimate compliance action should be waived. Rather, NWA strongly objects to the repetitious use of terms and conditions, with altered language, already imposed by existing regulatory authorities. The reimposition of these requirements is unnecessary, inefficient and will clearly create compliance problems when wordings vary.

In arctic and subarctic regions of Alaska, Section 404 permits are required for wetland areas which, pursuant to local interpretations of present regulations, include virtually all tundra and similar bog areas. Roughly 17.5 percent of the 745 mile long Alaska gas pipeline corridor has been classified as a wetland and subject to COE permits. The attached chronology of events traces the adoption of wetland definitions by the Executive Coordinating Committee (ECC), an ad hoc group consisting of senior officials of Federal and State agencies in Alaska. 1/ As a result of decisions by the ECC in 1978, vegetative mapping studies were identified as a prerequisite to filing applications for General Permits. Funded by NWA over a two-year period, at a cost of approximately $300,000, these studies were used to identify and locate wetlands categories "A," "B" and "C" along the pipeline corridor.

Adopting the ECC-recommended wetland categories and the COE recommendations for permit content,

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1/ Participants included at times the U.S. Fish and Wildlife Service, U.S. Geological Survey, Bureau of Land Management, Corps of Engineers, U. S. Environmental Protection Agency, State Department of Fish and Game, State Department of Environmental Conservation and the State Department of Natural Resources.

NWA applied for four General Permits in Category "C" wetlands which would adequately permit all construction activities in the pipeline corridor. Only Category "A" & "B" wetlands and navigable waterway crossings were left for later site-specific permitting.

In the initial public notice of proposed Section 404 General Permits, the COE did not utilize the four permit applications proposed by NWA. Instead, two different General Permits were drafted. This unilateral revision deleted major portions of the construction activity requested by NWA; i.e., gravel mining operations, and significantly increased the requirement for later site-specific permits. Nevertheless, these two initial General Permits offered offsetting advantages in that they were applicable to the entire pipeline corridor regardless of wetland category, i.e., the permits applied equally to "A," "B" and "C" wetlands. Although a number of changes would have been necessary in the general and special conditions, especially for those conditions that were redundant to, or in conflict with, Federal ROW grant stipulations, these two General Permits would have been a useable compromise.

Simply stated, it was assumed that since the COE had unilaterally decided to issue two general permits rather than the four requested, the COE had also unilaterally determined that the mitigative restrictions imposed by the permits and the authority of the OFI were sufficient to provide ample protection to all wetlands regardless of category.

The problem of Section 404 General Permits for placement of fill during or after operations in mineral material sites (gravel pits) remained. It could have been argued that the nature of this work requires such site-specific detail that a COE General Permit could not be used. Conversely, as NWA advocates, the mining of gravel is so functionally inseperable from pipeline construction that it too could be authorized by a General Permit, subject to OFI imposition and enforcement of such site-specific stipulations as appropriate.

More recently the COE has prepared a revised public notice (which has not yet been published) further restricting the proposed permits to Category "C" wetlands. Coupled with the failure of the COE to issue General Permits for all construction activities, this further limitation of permits to only Category "C" is undesirably narrow and inconsistent with the administration of Section 404 regulations in other States. This deferring of a large portion of the permitting to later individual site-specific permits introduces uncertainty of permit terms and conditions and eliminates most of the value of the General Permits proposed.

Establishing special wetland categories, which substantially increases COE permitting requirements, is not done for other construction projects in Alaska and is especially unnecessary solely for ANGTS construction. The special oversight authority and field monitoring staff of the OFI can be relied upon to enforce the appropriate levels of mitigation for any wetland or navigable water body.

CONCLUSION: The imposition of terms and conditions by Section 404 permits that are redundant to, or that vary in some minor detail from, conditions imposed by other agencies and the restriction of Section 404 General Permits to a locally adopted category of wetlands unnecessarily complicates COE permitting practices. Adherence to practices consistent with other COE districts and recognition of the special oversight responsibilities established for ANGTS by actions of Congress, the President and other government agencies, will ensure full and complete compliance with Section 404 regulations. Failure to establish General Permits applicable to the entire pipeline corridor and all construction activities as requested by the project sponsors will result in a requirement for perhaps as many as 250 individual site-specific 404 permits--a totally unnecessary redundancy in view of all the other, overlapping regulatory requirements to which NWA is subjected.

RECOMMENDATIONS:

1. That the COE undertake a special study to reexamine the intent of Congress for protecting arctic and subarctic wetlands and compare permitting practices in the continental 48 states to the local practices developing in Alaska.

2. That Section 404 permits issued by the COE not attempt to repeat or otherwise enforce other separate statutory or regulatory environmental protection requirements, thereby

restricting the focus of general and special conditions of the permit solely to determinations regarding placement of dredge and fill materials in the waters of the U.S.

3. That the participation of other Federal, State and local governmental agencies, which has resulted in a time-consuming, burdensome process, and a proliferation of unwarranted permitting requirements, be reviewed and streamlined. (Refer specifically to the provisions of 33 CFR Section 325.8.)

Attachment

7/7/82

CHRONOLOGY OF EVENTS

SECTION 404 PERMITS

September 1978	NWA consented to U.S. Government and State of Alaska agency requests to finance a vegetation typing study by the U.S. Fish and Wildlife Service (USFWS) to identify and classify vegetation types in the pipeline corridor.
March 1979	The USFWS issued a preliminary statement which identified 289 miles of major wetlands crossed by the 741 mile long gas pipeline corridor.
November 1979	Executive Coordinating Committee (ECC), an ad hoc group of Federal and State agency officials, established procedure to address wetland considerations.
February 1980	Interagency task force formed by the ECC established wetland categorizations as follows: "A" - avoid during construction "B" - site-specific permits required "C" - general permits will apply The task force utilized the tabular results of the NWA-funded USFWS wetland identification study and type mapping as a basis for categorizing all wetlands along the proposed pipeline route.
March 1980	The ECC transmitted a wetlands report to OFI endorsing three subcategories of wetlands--"A," "B" and "C." The revised 745 mile long Alaskan pipeline is expected to cross 0.24, 14.21 and 115.64 miles of Category "A," "B" and "C" wetlands, respectively.
August 1980	Final vegetation master map set (221 annotated map sheets) sent to NWA with indication that it would form the basis for wetland determinations. OFI requested 12 sets of full-size reproductions and 50 copies of the reduced "field" size. NWA production of these special maps, including field studies to gather the data, was accomplished at a cost of roughly $300,000.
August 1980	Meeting held in Anchorage by the OFI/COE with other agencies and NWA to discuss Section 404

permits. COE-suggested general permits included the following:

1. Workpads and compressor stations
2. Access roads
3. Camps and airfields
4. Excavated material disposal sites
5. Exploratory work

April 1981 General permit applications submitted by NWA for all Category "C" wetlands for the construction activities specified below. These applications implemented the recommendations made by the COE at the August 1980 meeting (with minor rewording of permit titles, a clarification of material disposal to specifically include gravel mining operations and exclusion of item No. 5 Exploratory Work, the subject of individual field program permits).

1. Pipeline/compressor and metering station civil construction
2. Access road construction
3. Camp/airfield/storage area construction
4. Material mining and spoil disposal site development

November 1981 COE formally notified OFI that general permits will not be issued in the manner previously suggested by the COE and requested in NWA's applications, but as follows:

1. Access roads and workpad
2. Temporary storage of ditch spoil and material and material imported for backfill.

Further, all other types of construction activity will require site-specific permits.

February 1982 COE issued public notices for the two general permits cited above that, absent restrictions to Category "C" wetlands, appeared to be applicable to all wetlands, regardless of category. NWA, in reply comments, accepted the concept of limiting the types of construction activity covered, offset by the apparent elimination of restrictions by subcategories of wetlands, and agreed with the permits except with respect to terms and conditions deviating from or redundant to the ROW grant stipulations.

April 1982 COE provided NWA with advance draft copies of revised public notices for the general permits restricting applicability to Category "C" wetlands only. NWA reply comments took exception and requested permits not be issued if restricted to Category "C" wetlands.

The cumulative effect of failing to issue General Permits for all construction activities requested and restricting applicability to only Category "C" wetlands, is an expected increase in the number of individual permits from roughly 60 (for General Permits and Navigable river crossings) to over 250 (for additional Category "A" and "B" wetlands and mineral material mining activities).

Office of the Federal Inspector
Alaska Natural Gas Transportation System

605 West Fourth Street, Room 107
Pouch 6619
Anchorage, AK 99502

24 JUN 1982 OFI-A0012021

RECEIVED
JUN 28 1982
A. KUHN

Mr. Edwin A. Kuhn, Director
Government Affairs
Northwest Alaskan Pipeline Company
1120 20th Street N.W., Suite S700
Washington, D.C. 30036

Dear Mr. Kuhn:

This is in response to your request for a "factual" review of a draft letter, position paper, and chronology of events related to the issuance to Northwest Alaskan Pipeline Company (NWA) of permits pursuant to §404 of the Clean Water Act, 33 U.S.C. §1344. These permits, issued by the U.S. Army Corps of Engineers, will cover the placement of dredged and fill materials in wetlands in connection with the construction of the Alaska pipeline segment of the Alaska Natural Gas Transportation System (ANGTS). I assume that the letter and accompanying materials are being drafted in order to provide input into the on-going executive review of the process used to issue permits pursuant to §404. Although we do not respond on a line-by-line basis, the more significant problems are identified and discussed briefly herein.

1. Scope of Authorization. The position paper (at 1) states that the Corps has "authoriz[ed] fewer construction activities than requested, thereby increasing the anticipated number of individual Section 404 permits from roughly 60 to over 250 in Alaska." In a related comment, the position paper (also at 1) states the the Corps has "impose[d] a special categorization of wetlands, applicable only to ANGTS which restricts the applicability of Section 404 General Permits." To put these statements in context, two important points must be considered.

First, it is an established legal principle that simply requesting a permit does not guarantee its issuance. While §9 of the Alaska Natural Gas Transportation Act requires permit issuance at the earliest practicable time, it does not do away with substantive legal parameters within which those permits must be issued. In this case, §404(e) of the Clean Water Act sets standards for the issuance of general permits.

Second, the position paper (at 1) focuses on the number of permits left to be acquired and on the 'imposition' of a new category of wetlands. It should acknowledge that, absent the the special efforts made by the Corps, i.e., the creation of the various categories of wetlands, the issuance of general permits would not have occurred.

More specifically, the creation of the categories allowed the Corps to meet the standard of §404(e) -- that activities be "similar in nature, ... cause only minimal adverse environmental effects when performed separately, and ... have only minimal cumulative adverse effect on the environment." By segregating those lands on which only minimal impacts would occur (Category C), the Corps was able to avoid issuing numerous individual permits. Thus, the vast bulk of the mileage on which NWA activities requiring §404 permits will be covered by the general permits; some 115 of 130 miles of wetlands are in "Category C." Moreover, for permitting purposes, more than one-half of the "Category B" wetlands (at least 7 of 14 miles) will be reclassified to bring them within "Category C."

Further, the position paper (at 3-4) and the chronology (at 2) do not note the varying extent of §404 permitting necessary for different construction activities; they leave the impression that general permits for 4 of 6 activities requiring §404 permits were denied. This can be misinterpreted. The overwhelming bulk of the 6 ANGTS construction activities applied for and requiring §404 permits -- temporary storage of ditch spoil and imported backfill; workpad and access-road construction -- will be authorized by general permits. While it is true that, in August 1980, a representative of the Corps suggested that NWA submit applications for general permits for 5 activities, the later application of §404 dictated that only 2 major activities be authorized by general permit. From your position paper and chronolgy, it appears that a sixth activity applied for by NWA -- material mining operations -- was not included in the Corps' August 1980 list of activities possibly eligible for general permits.

The only activities requiring extensive §404 permitting and denied a general permit are material-mining and permanent spoil-disposal operations. The denial of a general permit for these operations was based, among other things, on the variety of sites and potential impacts and/or the lack of specific information in NWA's application. Authorizing these activities in a general permit would require the addition of voluminous stipulations in order to assure that §404 would not be violated at any of the variety of sites. Since most of the additional stipulations would cover site-specific problems and thus not be applicable to the bulk of activities authorized under a general permit, the Corps decided that it would be more efficient to apply those site-specific stipulations only where they would be applicable, i.e., in individual permits. [~~NWA appears to have recognized this problem and has withdrawn its application for material site permits.~~] The permanent spoil-disposal application was never supplemented. *

Once material-mining and permanent spoil-disposal operations, workpad and access road construction, and temporary ditch spoil and backfill storage are authorized, the necessary residual permitting is not very extensive. There may be no need for §404 permits for camps (unless NWA extends existing pads in wetlands), only 2 or 3 presently planned compresor station will require a §404 permit, and most disposal sites are likely to be "upland" and thus require no permits.

2. Scope and Jurisdiction of §404 Permits Differs from ROW Grant. In the position paper (at 1-2), you state that the proposed §404 permit conditions are "additive, redundant, or sometimes modifications" of the Federal Grant of Right-of-Way, citing the "over 200 special stipulations"

* Deletion per OFI letter of July 7, 1982 (OFI-A0012032)

contained in that Grant, presumably as sufficient to cover the Corps' §404 requirements. The purview and purpose of permits issued pursuant to §404 are quite different from those of, for example, the Mineral Leasing Act. The Mineral Leasing Act and the Clean Water Act are different statutes and require, among other things, a different level of detail with respect to stipulations attached to each genre of permit. The more specific conditions contained in the §404 permits are intended to supplement the rather general stipulations on wetlands contained in the Grant. These reflect the different foci addressed above.

In a related statement, the position paper (at 1) notes that the Corps "fail[ed] to fully utilize the OFI's coordination and enforcement authority." This statement appears to be related to a statement (id. at 2) proposing that the Corps "delegate final responsibility for approval of site-specific design and construction plans to the OFI, to be handled in the normal course of the OFI's mandated design and construction oversight role." This is what the permits provide. Both the February 3, 1982, notices and the latest draft permits clearly state (at 2) that the OFI, pursuant to Reorganization Plan No. 1 of 1979, "will enforce this permit" if related to ANGTS construction and "will perform functions normally performed by the District Engineer." Furthermore, the drafters of the general §404 permits have integrated the enforcement requirements of the §404 permit with those of the federal ROW grant and the Decision so that the §404 permits "will be incorporated within the NTP" issued under the Grant and the Decision. (See, e.g., Special Condition 19, latest draft of GP 81-23.)

3. Time to Acquire Permits. In the letter, you draw attention to the "extended period of time" necessary to develop a permitting strategy. If read with your chronology, the reader could be left with the impression that the §404 permitting process per se has been in progress since September 1978 when, in fact, discussions prior to late 1980 were only exploratory and very general in nature. Applications for general permits were not received until April 1981. Moreover, with respect to the general permits, NWA never fully satisfied the Corps's submission request; e.g., the Corps had to find and copy standard workpad drawings from the FERC filing.

Furthermore, the issuance of general permits is only one aspect of the §404 process as it relates to ANGTS. Contrary to the implication in the position paper (at 2) that "complex new, redundant permitting strategies" have been developed for ANGTS, the ANGTS §404 process has worked relatively well. All site-specific §404 permits have been issued in less than 120 days of the time required documentation by NWA has been completed, which is often long after the submission of an application. Most have been issued, or were ready for issuance, within 60 days.

4. Scope of the February 3, 1982, Public Notices. The position paper (at 4) states that the Corps's February 3, 1982, public notices applied to all categories of wetlands when it only applied to "Category C." Although the words "Category C" do not appear in those notices, the definition of that category can be found in the respective applicability paragraphs (on the cover page of each notice). Thus, assertions that the Corps has changed its mind in its latest draft -- which, incidently,

is not a public notice even though presently printed on a public notice form -- are incorrect. Moreover, NWA applied for permits for activities on "Category C" wetlands only. Therefore, when considered in conjunction with the reason for creating the categories discussed above, dissatisfaction with the categories ultimately authorized does not appear to be well-founded.

If you have any questions in regard to this response, or the §404 permitting process generally, please do not hesitate to give me a call.

Sincerely yours,

Amos Mathews
Deputy Federal Inspector, Alaska

cc: Hengerer
Kari
Toskey
Sizemore
Pamplin
Urban

Office of the Federal Inspector
Alaska Natural Gas Transportation System

605 West Fourth Street, Room 107
Pouch 6619
Anchorage, AK 99502

7 JUL 1982 OFI-A0012032

Mr. Edwin A. Kuhn, Director
Government Affairs
Northwest Alaskan Pipeline Company
1120 20th Street, N.W., Suite S700
Washington, D.C. 30036

Dear Mr. Kuhn:

It has been brought to my attention that a comment contained in my recent letter to you on the Corps of Engineers permitting process (OFI-A0012021) may be subject to misinterpretation. That comment is found in my discussion of reasons for authorizing material mining on a site-specific basis, as opposed to issuing a corridor-wide permit (¶2, p.2). It states: "NWA appears to have recognized this problem and has withdrawn its application for material site permits." More precisely, NWA has expressly withdrawn only its application for material sales at individual sites, not its application for authorization to conduct mineral mining in wetlands. Since the quoted sentence is not critical to the substance of my comments on material-mining permits, I suggest that you delete it before distributing my letter to third parties and enclose this letter as justification therefore.

Sincerely yours,

Amos Mathews
Deputy Federal Inspector

cc: Hengerer
Kari
Toskey
Sizemore
Pamplin
Urban

Telecopied to G. Wuerch 7/7/82

RECEIVED
JUL 14 1982
A. KUHN

TESTIMONY OF

THE NORTHERN ALASKA ENVIRONMENTAL CENTER

FAIRBANKS, ALASKA

BEFORE THE

SUBCOMMITTEE ON ENVIRONMENT

AND PUBLIC WORKS

PUBLIC HEARING ON WETLAND MANAGEMENT

ANCHORAGE, ALASKA

JULY 8, 1982

The Northern Alaska Environmental Center appreciates this opportunity to testify before Senator Murkowski and this committee. We have watch-dogged the Corps. of Engineers' permitting program on the North Slope of Alaska since the value of the area's wetlands have been recognized. We feel that the permitting program has shown steady progress, both in terms of its efficiency and in balancing national desires for wetlands protection and energy development. Further progress may well be desireable and we support administrative procedures designed to avoid unnecessary delays. However, the process should not be undermined to avoid consultation with the resource agencies with expertise on wetland habitat values and to avoid mitigation of impacts in order to increase profits.

We are particularly concerned by the recent remarks and published statements of Alaska's Senator Murkowski concerning the relationship between the definition of wetlands and permafrost. On several occasions, he has questioned the inclusion of the soils and vegetation kept perenially inundated or saturated by an impermeable frozen soil layer in the very definition of wetlands under Section 40C. We wish to testify today on the biological values on the vast North Slope wetlands that are maintained by permafrost and what we consider to be the reasonable approach being taken by the resource agencies to mitigate the impacts of oil and gas exploration and development. The issues of delay and permit denial are separate ones that are best handled administratively, but let us not throw out the baby with the bathwater and abdicate protection of national and international fish and wildlife resources.

We must first comment on the unprecedented amount of actual and potential development that is likely to occur on the Arctic Coastal Plain. As you are well aware, the Prudhoe Bay oilfield was the first area to be developed. The area of pads, wells, access roads, pipelines, and support facilities is continuing to expand into the Kuparuk field and offshore to the barrier islands. The federal government has held lease sales in NPR-A to the west and under the provisions of ANLCA, is studying the potential impacts of exploration and development of the Arctic National Wildlife Range to the east. Joint federal and state offshore lease sales have been held or are scheduled in the Beaufort Sea and the State of Alaska has scheduled lease sales of onshore areas located outside the federal land units. Thus, the stage is set for location of oil and gas deposits over the entire area of the North Slope and the northern coastline. Development will involve concentrated development similar to that which has occurred in Prudhoe Bay in the area of the find, as well as a transportation system of roads and pipelines to link the fields to distant markets.

We feel it is clear that the North Slope wetlands meet the original intent of Congressional protection in that they are important national and international resources. The importance to bird populations is the most significant as Robert Bergman and his colleagues (1977) noted following a five-year study of bird populations in the Prudhoe Bay area, water-related birds dominate the bird fauna. They documented us of the area by 72 migratory species, 25 of which bread there, including the whistling swans, brant, white-fronted geese, pintail, eiders, oldsquaw, and plovers which are utilized by subsistence and sport hunters along their migratory path as well as numerous other migratory species enjoyed by bird-watchers in North and South America.

BLM conducted land use studies within NPR-A under Section 105(C) of Public Law 94-258, the Naval Petroleum Reserves Production Act of 1976. Following a two-year study, Derksen and his colleques (1981) found similar use of wetland habitat types on the Coastal Plain, with historical densities of breeding birds ranging from 2.3 million to 5.4 million birds used the Coastal Plain.

With proposed offshore leasing, another series of studies was initiated under the Outer Continental Shelf Environmental Assessment Program. These studies extended our knowledge about the importance of the coastal and offshore areas along the Beaufort Sea and were combined with ecosystem/trophic dynamics studies.

In 1979 from 4.9 million to 5.4 million birds used the Alaskan Coastal Plain (Derksen et. at. 1981). During periods of extensive drought in Canada and the north-central United States, large scale displacement swells these numbers.

One of the more spectacular uses of the Coastal Plain is during migration. Johnson, Adams, and Morrel (1975) summarized the information of the use of the Beaufort Sea and documented some 55 species of common migrants, who often stayed in lagoons and bays, and some 44 species which bred on the Alaskan Coastal Plain. The concentrations of birds at Teshepuk Lake for molt are similarly spectacular.

Birds are not the only resource; three major caribou herds are present. Two of these herds calve strictly on the Coastal Plain and wet habitats are essential in providing the food plants that contain the nutrients to sustain their annual cycle of productivity. Eighteen other mamal species, including wolves, foxes, grizzly bear, and muskox depend upon tussock tundra and wet sedge meadow habitats (BLM 1978)

The productivity of the wetlands and their critical nature for some wildlife species has been well-documented. The issue before us is whether the Corps. permitting program has functioned to protect wetland values without undue costs and delay to those seeking to develop the wetlands. We believe that the program has evolved over the past five years and is continuing to approach this goal. The many studies that were carried out were all directed at the practical goal of impact mitigation.

Prudhoe Bay and NPR-A studies have resulted in a system of typing and prioritizing between wetland habitat types in terms of their use and importance to wildlife. Habitat typing by interpretation of aerial photography and ground-truthing has been constantly refined to allow a more rapid assessment of high and lower value areas. This information forms the basis for negotiations concerning the citing of facilities requieed by the oil industry.

In our experience, the permitting process has consisted of active discussions and negotiations between the U.S. Fish and Wildlife Service. However, the permitting agencies have been hampered by a lack of information on comprehensive plans for future developments. Because the information is often held fiercely proprietary, each development and permit action must be looked at individually and piece meal development takes an extra, unnecessary toll on wetlands. Still in all, progress has been made in general permitting of activities with similar impacts. For example, placement of small gravel pads within Prudhoe Bay. Due to the planning that occurred on the proposed natural gas line, resource agencies coordinated a general permitting plan for lesser value wetland areas over 800 miles of gravel workpad and associated access roads well in advance of the proposed construction date. The developers could also increase the efficiency of the balancing act through planning and coordination. Once general plans existed, individual permit actions and the engineering leeway for changes that would mitigate impacts, could be resolved more quickly.

Conflicts between development and wetlands resources will continue to exist, even if the congressional body decides that redefinition is in order. A gravel pad that displaces a pond or marsh eliminates the carrying capacity of the number of ducks or plovers that wouldever be produced. An interlacing network of road, buildings, and two-foot high "feeder" oil pipelines in the middle of a caribou calving grounds reduces the potential productivity of the herd and ultimately, the allowable harvest for subsistence or sport uses. The number of acres of wetland that must be lost if the oil and gas development does occur and specifically, the impacts to wetlands of highest value, can be reduced through careful siting and planned, orderly development. It is a national government responsibility to ensure that development is not directed solely toward a rapid pace and maximum profits at the expense of all other public resources.

In conclusion, we urge that this committee look carefully a administrative improvements in the program. The intent of the process is basically a sound one and the relationship of the permitting agencies and those seeking permits is evolving and increasing in efficiency during a period when enormous demand for development is accompanied with a minimum federal effort to increase the knowledge about arctic resources and impacts. We are unable to address the deletion of wetlands underlain by permafrost from the definition because the absurdity of this proposition is immediately obvious to anyone who tries to walk the North Slope without hip boots. The North Slope is, indeed, de facto wetlands in terms of vegetation, soils, and productivity for water-related birds and the mammals that prey upon them. We urge you to take no steps that jeopardize thses resources.

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TESTIMONY OF
THE ALASKA CENTER FOR THE ENVIRONMENT
ANCHORAGE, ALASKA

BEFORE THE
SUBCOMMITTEE ON ENVIRONMENT
AND PUBLIC WORKS

PUBLIC HEARING ON
WETLAND MANAGEMENT

ANCHORAGE, ALASKA
JULY 8, 1982

The Alaska Center for the Environment also wishes to express its thanks for having the opportunity to testify before Senator Murkowski and this committee. The Center shares the hopes of other agencies and interest groups that the permitting program be developed readily, and that it strike a balance between environmental and development interests.

We are concerned about the lack of federal and state programs in Alaska geared toward the development of proper standards and permit procedures for the discharge of drilling muds into reserve pits associated with oil and gas operations. Our anxiety is heightened by the fact that both the Federal Resource Conservation and Recovery Act (RCRA) and the State of Alaska's draft hazardous waste management program fail to comprehensively address the issue of drilling muds. In fact, both programs exempt muds from any form of regulatory control. This factor, looked at in conjunction with the anticipated growth of oil and gas exploration statewide, poses a potentially serious threat to Alaska's wetlands and the associated wildlife that inhabit these areas.

Briefly, drilling muds, primarily a clay-like deposit (bentonite being a common type), are employed during the drilling process to support the walls of the drill hole, bring rock cuttings to the surface, reduce friction, and maintain subsurface pressure to prevent a blow-out. Bactericides, additives, binding materials, and anti-freezes are injected into the muds to enable them to perform their specifically designed tasks. For example, bactericides are used to control Ph and thereby inhibit bacteria growth in the drill hole. If left unchecked, bacteria could hinder the drilling process.

Additives such as lignosulfonates reduce the viscosity of the muds, while other additives act as dispersants, lubricants, flocculants, and emulsifiers.

Our concerns regarding drilling muds and additives are fourfold.

First, while the muds themselves are not necessarily harmful to wetland ecosystems, the additives , like chromolignosulfonates, salts, napthalenes, and caustic sodas, injected into the muds are, in the proper concentrations, deleterious to lifeforms inhabiting these wetland areas. A Canadian study addressing the acute toxicity of drilling muds on fish concluded that the drilling muds were acutely toxic to both local fish in the Mackenzie River Delta and Canada's bioassay fish, rainbow trout(Falk and Lawrence, LC50<5%).

In the past, drilling mud reserve pits have been excavated near rivers and wetlands in Alaska. A reserve pit created along a section of the Putullgayuk river is just one example of this phenomena. In the event of the river flooding and/or the reserve pit overflowing the muds would enter and contaminate the river system.

Second, the present construction designs for reserve pits are insufficient. The plastic and/or clay liners used to contain the muds in the pits are often punctured by rock fragments and other debris disposed of in the sump, thereby allowing the muds to escape into the environment.

Third, there have been many studies investigating the acute toxicity of drilling muds to fish and other wildlife, while relatively few studies have addressed the issue of the chronic toxicology of drilling muds. We would like to see more study in this area.

Fourth, there are approximately 200 miles of roads at Prudhoe Bay. In the past, the state has issued permits allowing the discharge of drilling muds on these roads to control dust. We are concerned that non-target areas off the road system could become contaminated due to run-off.

In essence, the Alaska Center for the Environment is troubled by the fact that drilling muds from oil and gas operations are being disposed of without a proper management program and without full knowledge of their effects on wet and dry land areas in the state. We ask that a drilling mud management program be implemented under the Clean Water Act as it pertains to drilling mud reserve pits located on, or adjacent to, wetlands. This program should specifically include:

1) A list of the types of muds and additives used by the oil and gas industries,
2) Standards for the concentrations of hydrocarbons and other additives present in the muds at the time of their disposal into the reserve pit (these standards should be based on acute and chronic toxicology reports),
3) Criteria for disposing of highly toxic muds in sites other than reserve pits,
4) A program to eventually substitute toxic additives with non-toxic additives, and
5) A monitoring system that tests areas adjacent to the reserve pits after they have been closed and the oil rig removed.

The program could be established on a site specific basis. That is, where reserve pits are excavated on wetlands, or where they could impact wetlands and waterways, specific permits and requirements would be developed for that particular reserve pit. Whereas, those reserve pits not adjacent to wetlands or waterways could fall under some general permitting program, thereby speeding up the permit process in these particular cases.

In the final analysis, the present management of drilling muds in Alaska is entirely inadequate. We feel that drilling muds under their present management threaten Alaska's fragile wetlands. We hope that steps are taken to protect these priceless areas.

Submitted by:

David Wigglesworth
Alaska Center for the Environment
1069 W. 6th Avenue
Anchorage, Alaska 99501

(907) 274-3621

Alyeska pipeline
SERVICE COMPANY 1835 SOUTH BRAGAW STREET, ANCHORAGE, ALASKA 99512, TELEPHONE (907) 278 1611, TELEX 090 25 127

July 8, 1982

United States Senate Committee on
Environment and Public Works
Anchorage, Alaska

Gentlemen:

Alyeska Pipeline Service Company appreciates the opportunity to present to this Committee its comments regarding the administration of Wetlands Permits.

Alyeska certainly recognizes the necessity of exercising caution in construction activities in areas which can be adversely affected, either as to plant or animal life, in truly wetland situations created by the presence of water. Coextensive with that concern, however, is the need which arises from time to time to undertake projects on the Trans Alaska Pipeline System in areas that have already been dedicated to the use of the Pipeline and in which disturbance of plants and animals vis-a-vis the water table will be minimal. An example is the construction of an additional equipment building at an existing Pump Station. The area selected lies within the already fenced right-of-way but does involve extension of an existing pad to use as the base for the new building. At present a minimum of 90 days is required for the approval process; more time is required if any objections are made during the notice period.

We particularly emphasize that we are discussing areas already dedicated and utilized as pipeline facilities. In these situations we would suggest that a solution could well be a visual inspection followed by the issuance of the equivalent of a letter of non-objection rather than a permit. We do not suggest that all permitting follow such a procedure but only those areas which have been theretofore dedicated to a particular facility, such as the Trans Alaska Pipeline.

When projects are undertaken in areas not theretofore disturbed it is hoped that the current processing time required by the Corps (after the expiration of the 90 day State required notice period) can be reduced from the present two, three and even four weeks to an almost simultaneous issuance after the notice period. We understand the fact that at present the Corps is undertaking a large volume of permitting without commensurate increase in personnel. Another solution could be to redefine the wetlands in a more realistic manner to allow exceptions in cases involving very little or no potential damage.

United States Senate Committee on
Environment and Public Works
July 8, 1982
Page Two

In summary Alyeska agrees with the concern for wetlands regulation but feels that the present system adversely affects not only the applicant/permittees but also the abilities of the Corps of Engineers to timely administer the current permitting procedures.

Sincerely,

G M Nelson

G. M. Nelson
Vice President - Operations

HGB:sk

The Effects of the Proposed Coastal Zone Management Regulations in Anchorage

Sewell F. Faulkner

During the past few years, many thousands of Alaskans have spent many millions of dollars trying to block D-2 legislation. Alaskans were saying that they did not want their land and their lifestyle manipulated by transient federal bureaucrats. This message was made even clearer at the polls in November when Alaskans overwhelmingly rejected any semblance of further federal meddling by their choice of representatives.

Now, ironically, we face a repeat performance. The Feds, assisted by dozens of State and local planners, are trying to D-2 the heart out of Anchorage, one of the fastest growing cities in North America. The disguise is called Coastal Zone Management, but the D-2 effects are the same: strangling the growth of Anchorage with potentially dozens of federal agencies errupting with ever changing rules and regulations.

No one can argue with the intent of the original Coastal Zone Management Act....that is to help preserve what's left of a decaying coastline in much of the South 48... and no one wants to see that degradation here in Alaska... but...the intent of simple coastal preservation has exploded into application of the federal strongarm to hill-side areas many miles from salt water as well as to the heart of growing midtown Anchorage...where construction of new office towers and apartments will await the whimsical approval of a Washington, D.C. biologist.

I'm sure that Anchorage is being slapped harder than any North American city by this bureaucratic nightmare, an actuality which is far from the intent of the originators of the law. Just imagine for a minute what our city would be like today if we had no growth in just the areas with wetlands classifications!

Former wetlands include the Ship Creek railroad yards, most of International Airport and the Lake Hood area... other wetlands where biologists could have stopped development include Inlet View and Bootlegger's Cove, two Nerlands stores ...the Sears Mall, the entire Calais development and the Anchorage Business Park. Others now house Gary King's... both Long's Drugs stores, Fred Meyer's, the Dimond Mall and Carr's Dimond Center, to name only a few. Where would Anchorage be today if it had been developed according to the $70 atlas that you are asked to approve this evening?

Now the retort of the planners is "The pretty maps in the $70 atlas are only pictures and there is no ordinance to make the maps effective." But, that's not an acceptable answer to a New York lawyer if you're trying to arrange a 25 million dollar loan on an office complex. The lawyer wants to know why your land is colored red, brown and purple.

And now the final and paramount objection with the $70 atlas is simply this: absolutely no consideration was given to the economic consequences. In not one of the thousands of pages of reports, plats and maps has anyone questioned the cost of these no-growth regulation to the land owners. Not one line was devoted to this adverse impact. Nor was any consideration given to future costs to the resident forced to live outside the Anchorage bowl who must commute with $5 a gallon gas to their employment center. The environment was studied to death. but no one asked the question: "What happens to the guy who just paid $2 million for land on Tudor Road and now must wade through a multitude of federal approvals in order to develop it?"

What's going to be the cost of a two year delay while the biologists, entomologists and ichthiologists make their studies?

And now to answer the final smoke screen that the proponents throw up. "there's nothing we can do about it, we're just implementing federal and state laws."

If this is the case, and I'm not sure it is, then we suggest that the local government not accept this D-2 effort sitting down...that the same effort be exerted...on a local scale, that was done on a statewide basis to fight D-2. It is a challenge to, without changing the intent of the Coastal Act, exempt the heart of Anchorage, one of North America's fastest growing cities from the stranglehold of the federal bureaucracy.

TESTIMONY OF BETTY J. GLICK, OFFICIAL REPRESENTATIVE OF THE CITY OF KENAI, ALASKA

I would like to take this opportunity to thank you for allowing me the privilege of presenting an update on the testimony I presented two years ago to a Senate Subcommittee, chaired at that time by Senator Gravel, on the permitting process regarding development on, and/or near Wetlands.

My testimony presented on June 23, 1980 is a matter of public record. Most of the comments presented at that time remain the same. However, there are two points I would like to specifically bring to your attention.

First, in my comments of June 23, 1980 I made reference to a proposed joint effort of the City of Kenai and Federal and State agencies regarding the possibility of coming up with mutually accepted criteria for the review and issuance of Wetlands Permits for development and fill, with the hopes that this criteria would speed up the review process. A copy of the proposed Memorandum of Agreement (MOA) is attached for your review and consideration. You will note by the list of agencies involved that this was what appeared to be one giant step forward in cutting down review time and bureaucratic red tape with reference to issuance permits for Wetlands development. I might point out that this (MOA) was the sixth one developed after many months of meetings and much give and take from all involved. However, with much regret I must point out this (MOA) was never adopted by the City of Kenai due largely in fact to testimony at our public hearing by the very people whom we had hoped to help. Their main objections being that the Federal and State agencies were getting the City to do their dirty work and also that this was just another way for the government to take their land and/or deprive them the use of it. I personally felt then and now that this was a great step forward in that the Federal and State agencies were at least able to agree in part on mutually acceptable review procedures, thereby cutting down on the review time and hopefully speeding up the issuance of permits. Perhaps you can further refine this MOA and incorporate it into new regulations you may promulgate.

Secondly I would like to say that subsequent to my testimony of June 23, 1980 I had the privilege of attending a two-week Wetlands Workshop at Elmendorf AFB, Anchorage, sponsored by the Corps. of Engineers. This workshop was very intensive. We had classroom time and also field time. It was very informative and helpful in that what you were told in class you could put to practical use in the field. Such as identifying plants, trees and other growth soils and hydrology indications as to whether or not the land was or should be considered as Wetlands. It was a very worthwhile workshop and I would like to see it sponsored again. I for one came away with a different perspective regarding Wetlands Development and also a greater appreciation of some of the reasons why we should be more careful in our development of land.

In summary I would like to thank you again for being able to present these comments for your consideration and to reiterate that we firmly believe in the permit process for development on, and/or near Wetlands, although it should be modified so as not to be so cumbersome. That we firmly believe you can have development without devastation and that by the attached MOA Federal, State and local government agencies can work together if they really want to.

MEMORANDUM State of Alaska

TO: Kenai wetlands working group

DATE: January 26, 1981

FILE NO:

TELEPHONE NO:

FROM: Murray R. Walsh, Coordinator
Office of Coastal Management

SUBJECT: Funding for wetlands project

RECEIVED
JAN 30 1981
BY CITY ADMINISTRATION
CITY OF KENAI

After a public hearing, the Kenai City Council passed a resolution on January 14 that expressed its "conceptual agreement" with the Kenai wetlands planning project. At the same time, the Council expressed reservations about the wording of the memorandum of agreement. Many of these concerns may have resulted from the public hearing.

Though the Council did not endorse the project as fully as we might have liked, they have spent a significant amount of time considering it and have stated their willingness to continue working with us. As a result, I have decided to release funding for the habitat studies by the Department of Fish and Game. We will go ahead and prepare the contract. The contract will, however, have to cancelled if the City does not ultimately endorse the project.

We will be scheduling one or more public workshops to further explain the project to people from Kenai during the next few weeks. Amy Kyle will give you further details on this.

We will look forward to continued progress on this important project.

MW/AK/jj

6

Kenai Wetlands Distribution List

Lance Trasky, Alaska Department of Fish and Game, Anchorage
Debra Clausen/Bill Donaldson, Alaska Department of Fish and Game, Anchorage
Glenn Akins, Alaska Department of Environmental Conservation, Juneau
Rikki Fowler, Alaska Department of Environmental Conservation, Anchorage
Roger Moulton, Alaska Department of Environmental Conservation, Soldotna
Larry Dearborn, Alaska Division of Geological and Geophysical Surveys, Anchorage
Reed Stoops, Alaska Department of Natural Resources, Juneau
Ike Waits/Carol Wilson, Alaska Department of Natural Resources, Anchorage
Bob Butts, Division of Minerals and Energy Management, Anchorage
Larry Reeder, U. S. Army Corps of Engineers, Anchorage
Jim Caruth, U. S. Army Corps of Engineers, Anchorage
Bill Lawrence, U. S. Environmental Protection Agency, Anchorage
Jim Sweeney, U. S. Environmental Protection Agency, Anchorage
Robert Bowker, U. S. Fish and Wildlife Service, WAES, Anchorage
Jon Nickles, U. S. Fish and Wildlife Services, WAES, Anchorage
Nancy Hemming/Brad Smith, National Marine Fisheries Service, Anchorage
Mark Stephens/Roger Maggard, Alaska Division of Community Planning, Anchorage
William Brighton, Manager, City of Kenai
Vincent O'Reilly, Mayor, City of Kenai
Gary Davis, Kenai Advisory Harbor Commission
Stan Thompson, Mayor, Kenai Peninsula Borough, Soldotna
Phil Waring, Planning Director, Kenai Peninsula Borough, Soldotna
Kramer, Chin and Mayo, consultants to Kenai Peninsula Borough, Juneau
Cliff Eames, National Wildlife Federation, Anchorage
Waldo and Ruby Coyle, Kenai
Chester Cone, Kenai
Gerald Brookman, Kenai
Jerry Andrews, Kenai
Ernie Knackstedt, Kenai
H.A. Poore, Kenai
Jesse Wade, Kenai
Andy Johnson, Kenai
George Fox, Kenai

MEMORANDUM State of Alaska

TO: Kenai Wetlands Working Group
Kenai City Council

DATE: January 15, 1981

FILE NO:

TELEPHONE NO:

FROM: Murray R. Walsh, Coordinator
Office of Coastal Management

SUBJECT: Proposed Kenai Wetlands MOA

RECEIVED
JAN 20 1981
BY CITY ADMINISTRATION
CITY OF KENAI

On January 14, the Office of Coastal Management conducted a meeting of the agencies involved in the Kenai Wetlands Project to consider changes suggested by the City of Kenai to the proposed Memorandum of Agreement (MOA). All of the changes proposed by the City were accepted by the agencies. Further changes will be required based on the public hearing during the evening of the 14th in Kenai. However, I am enclosing a copy of the MOA that incorporates the changes requested by the City for your use in further discussions on this topic.

cc: Persons who testified at hearing on January 14

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15 January 1981

Memorandum of Agreement
for
Kenai Wetlands Planning Project
between

Kenai Peninsula Borough

City of Kenai

U. S. Army Corps of Engineers

U. S. Environmental Protection Agency

U. S. Fish and Wildlife Service

National Marine Fisheries Service

Alaska Department of Environmental Conservation

Alaska Department of Fish and Game

Alaska Division of Policy Development and Planning

Alaska Department of Natural Resources

This Memorandum of Agreement (MOA) is between state and federal agencies with authority over wetlands within the City of Kenai, as outlined in Attachment A, and the local elected governments of the City of Kenai and Kenai Peninsula Borough.

This MOA formally commits the signatory parties to agree on a work program, participate in the development of a wetlands management plan for the wetlands within the City of Kenai, and to use the plan as the basis for permit review and planning decisions, to the extent allowed by law, including the federal guidelines adopted pursuant to section 404(b) of the Clean Water Act.

The project outlined in this MOA is sponsored and funded through the Alaska Coastal Management Program, which includes the Kenai Peninsula Borough, the City of Kenai, and the State of Alaska. Partial funding for biological studies is provided by the U.S. Fish and Wildlife Service.

Preamble

Wetlands are resources of local, state and national concern and have been recognized by the U. S. Congress as possessing important ecological and hydrological values. The U. S. Congress has mandated, through Section 404 of the Clean Water Act, that important wetland values and functions be protected. Congress has required that federal permits be obtained prior to discharge of dredged or fill materials in wetlands[1] and other waters of the United States.

A high percentage of the land within the City of Kenai is wetlands and falls under the federal jurisdiction of the Clean Water Act. There is currently interest in development within the City of Kenai. Conflicts over the proper management of the wetlands within the City of Kenai have emerged.

The Alaska Coastal Management Program offers an opportunity for resolution of conflicts and exploration of alternative ways to accommodate development while preserving the important functions and values of wetlands. A cooperative planning process, based on information on the resource values of the City of Kenai wetlands, and involving all interests, has the potential to balance resource and development needs and resolve conflicts. A plan for management of the City of Kenai's wetlands developed under a cooperative process could provide the following benefits:

1. Greater predictability in the permitting process.
2. Shorter review periods for individual permit applications.
3. Identification of any areas within the City of Kenai where certain kinds of development could proceed under general permits[2] if appropriate under the 404 program.

4. Accommodation and appropriate siting of the primary development needs of the City of Kenai as demonstrated through the planning process.

5. Assurance of protection of valuable natural resources associated with wetlands.

6. Potential for local government to use the plan as the basis for a program of land trading to exchange publicly held developable lands for privately held lands identified as having critical values and being not suitable for development.

The goals and benefits of this project are consistent with two of the primary goals of the Alaska Coastal Management Program: protection of important wetlands values and functions, and resolution of conflicts between competing uses of the coastal zone and different layers of government.

The Kenai wetlands planning project will include two phases, which will overlap in time. Phase One will involve the collection and analysis of data on the Kenai wetlands. Phase Two will consist of the planning and conflict resolution process.

Phase One: Data Collection

Introduction

Each of the state and federal agencies that are parties to this MOA has specific authority and responsibility for making determinations about wetlands values, as outlined in Attachment A. Information needed for these determinations has to date been obtained on a case by case basis from applicants and through agency investigations. Before agencies can participate in a planning process, each agency must have a means of obtaining basic information about the wetlands functions and values that fall under its jurisdiction. One of the purposes of this project is to obtain this needed information. An interagency working group has identified the topics for which information is needed and agreed upon work plans to provide this information. Ecological, biological and hydrological values are addressed. In addition, an assessment of the development needs of the City is needed.

Points of Agreement:

1) The area included under the studies and planning process is the wetlands and uplands as agreed to by the group within the corporate boundaries of the City of Kenai.

2) The Alaska Department of Fish and Game agrees to carry out the work outlined in attachment B, pertaining to use of the City of Kenai wetlands by mammals, birds, and fish, with funds provided by the Alaska Coastal Management Program (ACMP).

3) The U.S. Fish and Wildlife Service agrees to carry out the work outlined in attachment C pertaining to habitat values of the City of Kenai wetlands, using funds made available by the U.S. Congress.

4) The Department of Natural Resources agrees to carry out the work outlined in attachment D pertaining to the hydrology of the Kenai wetlands, with funds provided by the ACMP.

5) The U.S. Army Corps of Engineers, in conjunction with the Environmental Protection Agency, agrees to designate the areas that fall under its jurisdiction.

6) The five entities mentioned in points 1-5 further agree that results of these studies will be made available to the planning group by January 15, 1982, in a format that the group specifies. The agencies will regularly inform the City of Kenai and the Kenai Peninsula Borough of their activities and assist in preparing materials needed for a public information program.

7) The state and federal parties agree that a water quality study should be conducted.

8) The state and federal parties to this MOA agree that the information to be supplied through studies outlined in this part (supplemented as desired by any information obtained by any agency using its own resources) will be sufficient for the purposes of the planning process outlined and agreed to in this MOA. All state and federal parties agree to participate in the planning process on the basis of the information available at the completion of studies outlined in this MOA, unless the planning group mutually agrees that collection of additional data is required before or during planning process.

9) The City of Kenai and the Department of Natural Resources agree to obtain information needed for determination of development needs for the study area.

Part Two: Planning Process

Introduction

The planning process to be followed by the parties to this MOA is intended to reduce conflicts over management of the wetlands of the City of Kenai. The process must incorporate and balance competing interests within legal frameworks. The goal of the process is to achieve a plan acceptable and implementable by all parties to this MOA.

Points of Agreement:

1) All parties agree that Kenai Wetlands Planning Group, consisting of one representative of each party to this MOA, will be convened

within 30 days of the signing of this MOA. The group will undertake the project outlined herein and as further defined by the group. Each representative and an alternate shall be appointed directly by the person who is empowered to sign this MOA.

2) All parties agree that the Planning Group will define the role of a consultant to coordinate and mediate the planning process. The group will undertake steps necessary to hire the consultant.

3) All parties agree to employ their discretionary powers to reach agreement on a plan within legal and policy constraints and agree to participate in negotiations and mediated sessions, if necessary, to this end. Parties will primarily address areas for which they have expertise, responsibility, and legal authority.

4) All parties agree that specific agreements in the planning process will be made by consensus, meaning that no decision may be adopted while any one of the parties to this MOA objects to it. Further, if any party decides to withdraw from the planning process because of irreconcilable differences, after good faith attempts at agreement through mediation, this MOA is no longer binding and the planning process is discontinued.

5) All parties agree that the Planning Group will complete its tasks in a sequence and under a timetable agreeable to all parties.

6) All parties agree that the full involvement of the public, private interest groups, and other government agencies with responsibilities relevant to the study area will be provided for at every stage. The Planning Group will incorporate and address as many concerns as possible and advisable.

7) All parties acknowledge that provisions of federal regulations provided for in Section 404(b) of the Clean Water Act will be applied during the planning process. These regulations require that development in wetlands subject to the 404 program meet three tests. First, the need for proposed development must be demonstrated. Second, there must be no practicable alternative to development in wetlands. Third, there must be no significant adverse effect on aquatic resources.

8) The state and federal parties agree that every reasonable attempt, within the limits of law, will be made to accommodate the development needs of the City of Kenai as documented by the City and agreed to by the group.

9) The state and federal parties agree that there will be no moratorium on 404 permit reviews during this project.

10) All parties agree that the wetlands management plan will provide the basis for resource use decisions. Permit applications will be

reviewed for consistency with the plan. Those activities which are consistent will normally be approved while those that are not consistent would probably be denied. The plan will document when and to what extent 404 and other permit review criteria have been met. The parties recognize that stipulations designed to minimize adverse impacts of projects will often be added during permit review. The plan by itself will not provide the legal authorization or denial of a project nor will it supersede regulatory requirements or other legal authorities.

11) The City of Kenai and the Kenai Peninsula Borough express their intention to incorporate the wetlands management plan into their planning and zoning measures; ☆

12) All parties agree that the wetlands management plan will include procedures for amendment. Adoption of amendment will be by consensus decision of the entire planning group.

13) All parties agree that the Planning Group will undertake the tasks included in the following list. The Group may alter the tasks, through consensus decision.

14) In the event that the planning process is discontinued, the coordinator will prepare a report specifying the problems encountered and events preceding the end of the planning process.

The Planning Group will:

1) Prepare and adopt a public participation program.

2) Define the format for presentation of information on resource values collected pursuant to this MOA.

3) Determine the criteria for identification of planning units for the Kenai wetlands and divide the Kenai wetlands into such units as advisable.

4) With available information, develop criteria for assessment of the relative resource and natural values of the Kenai wetlands.

5) Classify wetlands within the City of Kenai into categories of natural value, according to the criteria developed in step four.

6) The City of Kenai and the Kenai Peninsula Borough will identify, through public involvement and the local decision-making process the land use needs of the City of Kenai. The group will decide which projects it believes to be water dependent, water-related, or not water-related.

7) Identify areas of the Kenai wetlands in which demonstrated development needs can be located and areas where wetlands will be protected.

[illegible]
[illegible]
[illegible]
F[illegible] + [illegible] agencies

8) Prepare recommendations for appropriate management of the Kenai wetlands.

9) Prepare detailed recommendations for enactment of the plan by the public and local state and federal agencies including how and to what extent federal and state agencies will use it in the permit reviews.

Footnotes -

1. For the purposes of the Clean Water Act, wetlands are defined as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." This definition is from Title 33, Part 322(c) of the Code of Federal Regulations.

2. By regulation, the term general permit refers to "a Department of the Army authorization that is issued for a category or categories of discharges of dredged or fill material that are substantially similar in nature and that cause only minimal individual and cumulative adverse environmental impact. A general permit is issued following an evaluation of the proposed category of discharges in accordance with the procedures of this regulation . . . and a determination that the proposed discharges will be in the public interest . . ." This definition is found at Title 33, Part 323.2(p) of the Code of Federal Regulations.

KENAI PENINSULA BOROUGH
BOX 850 · SOLDOTNA, ALASKA 99669
PHONE 262-4441

STAN THOMPSON
MAYOR

Testimony Presented Before
The Senate Committee on Environment and Public Works
Concerning Federal Wetlands Management

By: G. S. Best
Administrative Officer
Kenai Peninsula Borough

July 8, 1982 Anchorage, Alaska

The Corps of Engineers permit process for a simple fill or dredge application takes from 4 to 6 months. In most individual cases, fill is minimal due to the high costs of gravel and hauling. These individual projects also have minimal impact on any true wetland areas, as a true wetland in almost all cases is not compatible with permanent human habitation.

The Corps of Engineers does not have the manpower or budget to fully delineate and evaluate all lands that may be defined as wetlands. This situation increases the burden on both government and the private land owner in that no investigation is available. The few true wetlands are therefore obscured by the many inconsequenting applications defeating the purpose of the whole wetlands regulatory effort.

In many cases wetlands classification has not taken into account the underlying soils and ground cover. This is especially true in Alaska. To many people in Alaska, the wetland classification is a form of inverse condemnation.

Existing problems with the Corps of Engineers Section 10 and 404 permitting process includes the following:

1. One agency will copy comments to other agencies, who repeat same comments, making appeal process impossible.

2. A four month turnaround period for a routine permit is unreasonable.

3. For applications involving improving road safety, there should be no opposition.

4. The Borough recognizes the importance of the fish resource, so it would be helpful if the Borough's process was reduced to just dealing with Alaska Department of Fish and Game.

The Borough supports the "general permit" concept as one way to mitigate some of the problems discussed previously. This is a constructive way of identifying the "minor" projects subject to the Corps of Engineers permitting regulations. Activities such as access roads, driveway pads and building foundation pads for residential use; as well as sanitation facilities, culverted crossing of non-anadromous streams, clean rock fill, boat docks and mooring buoys should all be recognized as "minor" projects. A Borough-wide general permit procedure is encouraged which would encompass all of the defined work activities. Expeditious processing and predictability in evaluating work proposals are advantages to the regulatory agency and developer alike under the general permit concept. Lastly, it would benefit all if the wetlands classifications were objectively defined in regards to those activities not covered under a general permit.

G. S. Best
Administrative Officer

Information presented in the "Exploratory Soil Survey of Alaska," published in 1979 by the Soil Conservation Service, U. S. Department of Agriculture, indicates that 176,062,000 acres or 48.5 percent of the land area of Alaska is wetland as defined by the Fish and Wildlife Service. These wetlands are extensive in all areas of the state, though they are especially prevalent on the north slope (81 percent of the area) and in western Alaska (70 percent). Much of the wetland in these areas and elsewhere in Alaska is upland in which internal drainage is restricted because of the presence of permafrost rather than the low-lying bogs and marshes traditionally associated with the term.

It is obvious that, because of the large proportion of the state that will be so classified, the restrictions that apply to the development of wetlands are of great importance in Alaska. One major concern is the effect these restrictions might have on the development of agriculture in the state. More than 10 million acres, roughly half of the 20.5 million acres that have been identified as potential cropland, will be classified as wetland as presently defined. Three principal kinds of soils are involved: (1) Soils of flood plains that are occasionally inundated, especially in the spring, but that are at other times well drained; (2) soils of foot slopes or shallow depressions affected by runoff water; and (3) soils with permafrost tables that recede to considerable depth after clearing.

The most productive soils in much of the world are on flood plains. This is particularly true in northern areas. In the Yakutian Lowland of northeastern Siberia, for example, under climatic conditions similar to those of interior Alaska--and where agriculture is much farther advanced, at least in terms of acres under cultivation--most cropland is on the flood plains. Spring floods provide the moisture necessary for good yields, and the water recedes before the normal planting time. In Alaska, some of the most productive existing farms in both southcentral and interior Alaska are on flood plains. In all, about 4.5 million acres of potential cropland in Alaska consist of occasionally flooded land.

Because of runoff from higher areas, soils of footslopes and shallow depressions also receive more moisture than is supplied directly by rainfall. In interior Alaska, where precipitation generally provides less than the optimum amount of moisture for crop growth, this is a distinct advantage that is reflected in higher crop yields. No artificial drainage is required for these soils. Many of them, especially on foot slopes, are subject to thermokarst pitting after clearing, but this is seldom a serious obstacle to farming (though it is of great concern in locating buildings). A large part of the land in the Fairbanks area that has been farmed since the gold rush days consists of these soils. More than 4 million acres of comparable soils in the interior have been identified as potential cropland.

Certain soils with impeded drainage because of the underlying permafrost can be brought into cultivation simply by clearing. When the surface accumulation of organic matter is removed the permafrost recedes to depths great enough so that it no longer affects moisture in the root zone. These soils generally occur on terraces bordering flood plains of major rivers in the interior. One example is the lower field of the Agricultural Experiment Station in Fairbanks, which has been cropped continuously since the establishment of the station. It is important to recognize that only a small proportion of the poorly drained soils with permafrost in Alaska are of this kind and have agricultural potential. About 1.5 million acre~~a~~s have been identified.

It would be unfortunate if, in preparing these or other arable soils with characteristics of wetness for agriculture, a prospective farmer would need to obtain permits from the Corps of Engineers or another government agency to perform essential farm operations including the initial land clearing. This could be a major impediment to agricultural development in Alaska. I would suggest that, in areas where land is made available for settlement and agricultural development, an automatic waiver of all permit requirements relating to wetlands be granted for soils that are assigned to Land Capability Class II or III (including those in subclasses IIw and IIIw) by the Soil Conservation Service, or that meet the standards for such classification in areas not yet covered by detailed soil surveys.

Tundra areas of western Alaska, most of which consist of wetlands, are used and have great potential for expanded use for reindeer grazing. Restrictions are necessary in important nesting areas, but in most of the uplands herd and range managers should be allowed to operate free of unnecessary restrictions. On public land, oversight of range use by appropriate federal and state agencies should be adequate to prevent abuse of the tundra and its wildlife without imposing an additional layer of wetland requirements and permits.

Samuel Rieger

Samuel Rieger
State Soil Scientist, Alaska
(retired)

WETLANDS HEARING

Distinguished panel, my name is Douglas A Witte and I am here today to offer comment on the National Wetlands Inventory Program, not only as the representative of the Alaska Soil Conservation District, but also as a professional soi scientist and concerned citizen.

Wetlands classification is a delicate issue, as I am sure you are well aware, especially here in Alaska where it is such an integral part of the environment. The National Wetland Inventory has undergone immense scrutiny over the past year and as the former Assistant State Soil Scientist for the USDA Soil Conservation Service, I was able to review the list of proposed wetland soils in Alaska and offer comment. I've also become vaguely aware of the politics involved surrounding the wetlands issue.

The SCS has requested the removal of several soil series from the present list of wet soils in Alaska. This list was given you prior to this testimony. Most of these soils show genetic and morphologic characteristics which either indicate a fluctuating water table, occasional flooding of short duration, or presence of permafrost. None of these limitations however, when associated with these soil types are considered severe enough to influence the production of agricultural crops. This fact is substantiated by their land capability unit classification.

Those soils which are classed IIw, IIIw or IVw may be subject to seasonally high water tables in the spring, or occasional flooding from surface runoff during years of abnormal precipitation or snow pack. Permafrost soils which have developed on specific geomorphic landscapes, will thaw and naturally drain once cleared with no remaining evidence of wetness. The Tanana Series found on the Delta Project is evidence of this condition. Soil series in land capability class VIw and VIIw may have a more prounounced wetness condition than class IVw soils, however their suitability for subirrigated pasture and hayland is excellent. Land capability class VIIIw soils are recommended to be managed as wildlife habitat because they are truly wetland soils when keyed through the land capability classification system.

I've been assured through correspondence with Mr Hall, that Soil Taxonomy has played an active role in the wetland classification. It remains my impression, however, that wetlands maping still promotes the primary use of Cowardins system of wetlands indentification. My concern stems from the use of hydrophytic indicator plants. In northern latitude climates where the transevaporation rate is relatively low, soils which are moderatley well drained may support the same native plants as found on somewhat poorly and poorly drained soils. My question is --"Are photo interpretation specialists able to accurately make this separation?" I have likewise experienced in the field, situations where somewhat poorly drained soils have Calmagrostis or blue joint grass vegetative cover of similar composition to adjoining well drained sites. Mr Fletcher, State Soil Scientist for the SCS may wish to comment further if given the opportunity upon completion of this formal statement.

I am sure that discrepancies of this type can be handled as long as land use policy doesn't preceed completion of an accurate inventory which explicitly deals with physical characteristics of soil as well as the vegetation.

With this in mind, I would like to now turn my attention to the role of the Alaska Soil Conservation District. This district has been duly established under the authority of AS 41.10 and has the responsibility within the state to encourage the active interest of land owners and operators and the public and informing them of the necessity and methods for achieving resource conservation objectives. It is declared to be the policy of the District, in the interest of the health, safety and general welfare of the people of the state to provide for the development, use and conservation of these lands in accordance with their capabilities.

The District Board of Supervisors are appointed by the governor for three year terms, and represent several geographic factions of the state. They are long time citizens and understand the life style of their local area. They also have an active interest in the development of its natural resources through conservation and wise land use planning.

Since 1947 the Alaska Soil Conservation District has been active in guiding the development of agriculture through conservation planning. For the past 35 years the District has managed its operations through a Memorandum of Understanding with the USDA Soil Conservation Service. This unique relationship provides the District with the technical expertise required to develop effective resource conservation plans.

Our program deals mainly with assistance to private land owners, and recently have become overwhelmingly involved in Alaska's agricultural land disposal. Farm plans are required as a part of the contract of sale on land sold by the state for agricultural use. These farm plans are developed by the land owner and SCS personnel and approved or disapproved by the local Subdistrict Board of Supervisors. The farm plan suggests a variety of land uses based on the capability of the soils within the farm unit and offers a combination of applied conservation practices to reduce the risk of soil erosion and deterioration of water quality. At no time is drainage a recommended practice for the SCS has a wetlands protection policy much like what is proposed. Recommended land use is controlled by the degree of wetness experienced and may range from grazing of domestic livestock to wildlife habitat.

The Alaska Soil Conservation District is in the process, at this time, of entering into a Memorandum of Understanding with the State of Alaska, Division of Forestry. Through this agreement the conservation plan will expand to address management problems of privately owned timber. Through the public hearing process the Soil Conservation District has been recognized by the Department of Environmental Conservation as the best mechanism available for the implementation of the agricultural phase of Alaska's Water Quality Plan Sec 208. The District's best management practices are considered by DEC as being effective in reducing the hazard of non-point source pollution.

The present method of regulating development on wetlands is a one time permit process. The Soil Conservation District views this process as being time consuming and somewhat ineffective when applied to privately owned and operated lands. We would support an effort to address management of wetlands that fall within private ownership in terms of the conservation plan. We would also welcome a close working relationship with the US Fish and Wildlife Service and the Alaska Department of Fish and Game so that our management practices for wetland environments might be more cohesive to the preservation and improvement of true wetlands.

WASDA PROPOSED RESOLUTION

The national wetlands inventory by the US Fish and Wildlife Service is an important first step in the identification and subsequent management of wetland resources to carry out the purpose of wetland legislation designed to maintain the hydrologic and ecological values of such areas. The Cowardin Fish and Wildlife classification system is too flora oriented and ignores the effects of soil type, seasonal water table fluctuations, altitude, climate and frost conditions. For example, seasonably wet soils, when created by frost or temporary water table conditions; are not wet lands as envisioned by the legislation. Strict interpretation and application of the classification system adds to the already burdensome administration now in place to carry out Congressional dictates. The inflexibility of the system can lead to inefficient land use, increased farm development and operation cost, and unnecessary government involvement in farmland management.

Be it resolved by WASDA at Sacramento that the US Fish and Wildlife classification system be amended to provide the flexibility to adjust to local and specific conditions so the public acquisition of wetlands be consistent with proper land use. Be it further resolved that classification and acquisition proceedings include review and approval of such actions by county officials with the concurrence of the appropriate State Departments of Agriculture.

CLEAN WATER ACT AMENDMENTS OF 1982

FRIDAY, JULY 16, 1982

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION,
Washington, D.C.

The committee met at 10:05 a.m., in room 4200, Dirksen Senate Office Building, Hon. John H. Chafee (chairman of the subcommittee) presiding.

Present: Senators Chafee and Gorton.

OPENING STATEMENT OF HON. JOHN H. CHAFEE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator CHAFEE. Good morning.

Today the Environmental Pollution Subcommittee is meeting to conduct a hearing into the implementation of section 404 of the Clean Water Act.

This hearing is focusing on the regulations first issued in September 1980 to implement the 1977 amendments to the act. Those regulations were issued by the Corps of Engineers. After their issuance, extensive comments were filed. Two of the most extensive comments were prepared by agencies appearing before the subcommittee today, EPA and Fish and Wildlife.

I might say that those comments on the Corps of Engineers' proposed regulations were hardly laudatory.

The Corps of Engineers is preparing to republish the September 1980 regulations. I understand the decision was made yesterday to publish those regulations on an interim basis, rather than in final form, as was requested. I applaud that decision. This will allow interested Federal agencies, as well as the public, to give further comments on the proposals. It will also provide for ample time to thoroughly analyze their impacts.

Let me just say a few more things before calling upon the witnesses. Section 404 of the Clean Water Act has been an extremely difficult portion of the act to administer. It requires vast amounts of coordination among effective resource agencies, as well as between the agencies and the public. All of this coordination is time-consuming and resource-intensive. But it also is extremely important.

Section 404 is the only program the country has that provides sure protection for our coastal and inland wetlands. It is not a tool to stop or delay economic development, as some would suggest. It was intended by Congress that an orderly regulatory program would be established to allow us the opportunity to grasp what was happening to this resource base that is a critical component of our fish and wildlife resources, as well as being a direct link to our effort to restore and maintain the biological, physical, and chemical integrity of our Nation's waters.

The regulatory impact analysis done for the Vice President's task force earlier this year attested to the fact that the program was beginning to work much smoother after the original shakedown period.

Today we will focus on only the 1980 proposals that impact on the resource base and the interagency coordination that led up to where we are today.

Assistant Secretary Gianelli is unfortunately unable to be here because he is chairing a meeting of the Panama Canal Commission. His deputy, Mr. Dawson, will represent him.

The Commerce Department was also interested in testifying today but did not feel it had sufficient time to review the new proposals. We will keep the record open so their comments might be received.

Let me just make one point clear, if I might, because sometimes people lose sight of what the purpose of the Clean Water Act is. The objective of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. The purpose of this hearing is to determine if the implementation of those regulations that the Corps of Engineers is proposing will bring about reasonable further progress toward that objective: The objective of maintaining the chemical, physical, and biological integrity.

Biological integrity involves the wildlife as well as other aspects. And so, yes, we will be interested in just what you are doing with these regulations.

I now call on Mr. Dawson, who is here representing the Corps of Engineers.

Mr. Dawson?

STATEMENTS OF ROBERT K. DAWSON, DEPUTY ASSISTANT SECRETARY OF THE ARMY FOR CIVIL WORKS; JOHN HERNANDEZ, DEPUTY ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ACCOMPANIED BY PAUL CAHILL, DIRECTOR, OFFICE OF FEDERAL ACTIVITIES, EPA; G. RAY ARNETT, ASSISTANT SECRETARY, DEPARTMENT OF THE INTERIOR; AND CAROL DINKINS, DEPUTY ATTORNEY GENERAL, LAND AND NATURAL RESOURCES, DEPARTMENT OF JUSTICE

Mr. **Dawson**. Thank you very much, Mr. Chairman.

It is a great pleasure to be before you today and an equal pleasure to share the witness table with my colleagues and friends from the other agency.

We are particularly pleased to come before you to discuss the Army's views of our recent changes to corps permit regulations.

As you mentioned, Mr. Chairman, Mr. Gianelli, Assistant Secretary of the Army for Civil Works, regrets that he is unable to present the Army's views personally. Secretary Gianelli is in the Republic of Panama this week, chairing a long-scheduled quarterly meeting of the Panama Canal Commission.

Mr. Chairman, with your permission, I will give an oral summary of my full statement, which I will submit for the record.

Senator CHAFEE. Yes; that is fine, go ahead.

Mr. DAWSON. As requested in the chairman's letter of invitation to appear before this committee at this hearing, I will direct my testimony to the regulations proposed in September 1980 and the current status and effect of implementing them.

The rules and regulations which cover the Corps of Engineers' regulatory program for the past 5 years were published on July 19, 1977. Shortly after that, in December 1977, Congress amended the Clean Water Act and made extensive changes to section 404. The 1977 amendments directed us to reach agreements which involved Federal agencies to streamline the 404 permitting process. These agreements took over 2 years to consummate.

In order to incorporate the Clean Water Act amendments, new policies and the provisions of the new interagency agreements, publication of new regulations as proposed rulemaking did not occur until September 19, 1980.

Along with the need to change the regulations to reflect the 1977 amendments, there are other reasons for improving the regulations. First, the corps found that its nationwide general permit program initiated in 1977 was a very effective way to reduce regulatory burdens while still fulfilling responsibilities under the Clean Water Act. Because of this success, we desired to expand that program.

Second, a number of other new laws, Executive orders, judicial decisions, policy changes, and other agency regulations affecting the corps' permit program had taken effect since adoption of the present regulations on July 19, 1977.

Finally, it is clear to us that this program is simply not functioning properly. I have a tabulation of some statistics which is in my written statement. It shows that even in cases where there are absolutely no objections, permit processing time averages over 2 months and can run as long as 6 months. If any objections at all are raised, regardless of the merits of the objections, processing averages 9 months. Where environmental impact statements are required, it takes an average of over 2 years and can take up to 4 years to get a decision on a permit application. Over 5,000 individuals and businesses annually are subjected to major delays and an additional 10,000 or so experience unwarranted delays of several months.

Senator CHAFEE. Let me just make this point, Mr. Dawson. The objective of the program is not to get permits out as quickly as possible. The objective of the program is to keep the waters clean. So bear that in mind when you say the program is not working successfully. You are coming at it from a different point of view.

I suppose under your point if every permit got out in a day, it would be a successful program.

Mr. DAWSON. No, sir, if I may, what we believe is the program can still meet the statutory requirements and yet function in a much quicker manner.

There are instances which are all too common where private individuals have had to wait many months and even years to get a decision on a request for very minor actions on their own private property. In addition to private citizens, there are numerous cases where industry projects have been delayed for years, causing economic losses which far exceed the value, tangible or intangible, of any resource protection gained by the delay.

Senator CHAFEE. Mr. Dawson, in the chart that you submit on page 3, are those solely 404 permits or do those include some of the rivers and harbors, section 10 permits?

Mr. DAWSON. I believe that is both 404 and section 10.

Senator CHAFEE. Why would we be interested in section 10 delays there?

Mr. DAWSON. As you know, a good percentage involve both section 10 and 404 permits. When an applicant comes in, in many cases, I believe it is maybe over 50 percent, he has to give both 404 and 10.

Senator CHAFEE. I think it would be more helpful to us if we had the ones that involve 404 or 404 combined with section 10 only.

Mr. DAWSON. I see.

Mr. Chairman, the new regulations have 25 changes that we consider moderate, 17 of which will provide regulatory relief and 2 which we would classify as most significant changes, which provide most of the regulatory relief. The two that we consider most significant are, one, requiring most permit decisions to be made in 60 days and, two, expanding the nationwide permit program.

The advantages of all the changes are to reduce many of the delays and duplications which have plagued the program. I will briefly discuss several of the moderate changes which are being made in the regulations.

A section is added to clarify and define what activities were exempted from the 404 program under section 404(f). EPA also has the call on defining the exemptions under the Attorney General Opinion of 1979 and has approved this section.

Procedures for preapplication consultation on major applications are added. While this will add burdens on the corps, it should produce a net benefit to applicants for major projects by reducing postsubmittal processing delays.

Division Engineers are given the authority to add regional conditions to nationwide permits. This is a new concept that will require added corps effort, but is seen as an appropriate way to maintain an effective nationwide permit program while still providing appropriate protection to the Nation's waters.

We have adopted a concept of general permits for State programs which duplicate the Federal program provided that the resulting activities have individually and cumulatively minimal environmental impacts.

Language is added to limit requests for additional information once an application is considered complete. An applicant should not be subjected to repeated time-consuming requests for additional information.

The new law requirement will be added to section 404(a) that public notices will be issued within 15 days of receipt of the completed application.

Finally, 5 existing nationwide permits for specific activities are reissued, 6 existing ones are expanded in coverage, and 14 new ones are added.

Mr. Chairman, in reaching decisions on the final versions of these regulations, we subjected the proposed regulations to extensive review, evaluation and modification. We received over 400 letters comprising thousands of pages of comments, including several hundred pages from other Federal agencies covering the full spectrum of reaction from strong opposition that the regulations were too environmentally oriented to strong support for a balanced program to strong opposition that the regulations were too development-oriented.

On balance, the public comments were favorable. A work group was convened of about 20 of the Army's most seasoned regulatory experts as a balanced interdisciplinary team to review each and every comment. The major issues were identified and evaluated and policy decisions recommended. Based on a work group recommendation, we held two public hearings during June 1981 in Washington, D.C., and St. Paul, Minn. Hearing testimony was synthesized into the work group recommendations by a smaller work group and decisions were reached on how the final regulations should be structured.

It is noteworthy that the regulations proposed in September 1980 have been subsequently modified in many minor ways and in two major ways, all of which have strong support in the public record. The major changes are to reduce the target for average processing time for most permit applications from 105 days—90 days from the date of public notice—to 60 days from receipt of application, and also to authorize division engineers to modify nationwide permits to better account for regional variations in potential impacts.

I will now briefly discuss the impact of the changes on the regulatory program.

As pointed out, there are many small but cumulatively significant program changes which will improve the corps' execution of the program without sacrifice to the protection of the Nation's waters. We are not reducing the environmental or other factors which a district engineer must consider when making a public interest decision. Instead, we are taking those steps necessary to make the testimony more responsive to the regulated public and provide an applicant with a decision in a reasonable period of time. The reduction in delays will save millions of dollars and the regulated public will receive a much better response from their Government, something they rightly deserve.

The expansion of the general permits will reduce the intensity of Federal control over many activities when that control has been found to be not needed due to the minor and similar nature of the activities or when the control is already being adequately exercised by local, State, or other Federal agencies.

Corps resources, which are free from the unnecessary processing of individual permits can be diverted to quality management and control of the more significant water resources activities. Further, the enforcement and surveillance program can be shored up and resources diverted from the processing of individual permits.

In summary, I believe that these regulations represent a good first step in making the corps regulatory program more responsive to the public interest. These regulations contain many changes which individually represent only minor impacts on the program.

However, taken together, they will greatly improve program execution while still protecting the Nation's waters. The proposed regulatory changes were approved yesterday, as you alluded to, Mr. Chairman, by OMB as an interim final rule. This means that when they are published in the Federal Register, there will be a request for additional comments. This will give the Federal agencies involved an opportunity to provide additional comments on these procedures.

Thank you very much, Mr. Chairman, for the opportunity to discuss this important matter with you, and I am prepared to answer any questions you may have.

Senator CHAFEE. I think what we will do is take the balance of the panel and hear their views.

Just one question, then, Mr. Dawson.

It is my understanding you revoked the requirement that activities in waters of more than 10 acres obtain an individual permit; is that correct?

Mr. DAWSON. Yes; that is part of the expanded nationwide permit.

Senator CHAFEE. Does that fall under the minor changes that you suggest?

Mr. DAWSON. Yes; the information that we have been given, from our experts out in the field, who have been working with this program over the last 5 years, is that the impacts of this will be minor. And I might point out, Mr. Chairman, that in this one area, the regional conditions of permits is an important factor to perhaps keep in mind. In those areas where there might be greater sensitivity, it would be possible to have a regional condition. I think I should point out, too, we are talking only about isolated waters and waters above the headwaters, not other bodies of water.

Senator CHAFEE. You mean any water that doesn't have a flow of 5 cubic feet per second is no longer covered under your regulations; is that correct?

Mr. DAWSON. That was true before, yes, sir.

Senator CHAFEE. No; that was not true before. If it was less than 10 acres, it was true.

Mr. DAWSON. Right, but I thought you said anything above.

Senator CHAFEE. Yes; but what you have done now under these regulations is a nationwide permit which will permit any activity to be carried out on these waters above 10 acres in size, previously less than 10 acres were not covered. Now you are defining all waters in the country.

Mr. DAWSON. No, sir, it is only those waters that are isolated and above the headwaters. It is not all waters in the Nation.

Senator CHAFEE. I know, but any waters that do not have a flow of 5 cubic feet per second.

Mr. DAWSON. And it's an isolated body of water.

Senator CHAFEE. Some of the statistics I have here show that no longer would permits be required for some one to two million acres of lakes and associated wetlands in Minnesota, Michigan, and Wisconsin; 150 to 200 thousand acres of interior waters in Florida; 235 acres of wetlands adjacent to Great Salt Lake in Tuah; and 700 to 900 thousand acres of prairie pot holes. Now, is that minor?

Mr. DAWSON. Sir, if I may take just a moment to indicate how we developed the nationwide permit and deciding this would be an appropriate one. We asked the Corps of Engineers out in the field, the people who have been administering this program over the past several years, to identify those areas where they felt the impacts, the controversies, the concerns were minimal and this, in fact, was one that that expertise indicated was an acceptable area for nationwide permitting, keeping in mind that the regional condition is possible, as well as the possibility of taking out any particular activity and making it go through the individual permitting process if concerns are raised about a particular activity.

Senator CHAFEE. We will get back to that. Why don't we take Ms. Dinkins, Assistant Attorney General, next.

STATEMENT OF CAROL DINKINS

Ms. DINKINS. Thank you.

I am Carol Dinkins, Assistant Attorney General for Land and Natural Resources, Department of Justice. We represent the U.S. Army Corps of Engineers both in enforcement and in defensive matters. Since a significant part of my private practice before I came to the Department involved section 404, I believe that I have a working knowledge of the program and a sense of where it works well and where it might be improved.

I have maintained a close familiarity with the corps' section 404 litigation while I have been at the Department.

In the 9-month period since October 1981, we have received 80 dredge and fill enforcement referrals from the corps. We have just settled the largest, and I think most environmentally significant, section 404 case ever brought. This settlement involves a large tract of land in the panhandle of Florida. About 8,000 acres of damaged or destroyed wetlands will be restored and pollutants from about 14,000 acres of farmland will be diverted into a settling pond for purification for discharge into the Apalachicola River. In addition to the sheer magnitude of this restoration, the largest ever implemented, significant pollution reduction benefits will accrue to the Apalachicola Basin, which is one of the most productive shellfish nurseries in North America.

This settlement, I think, is background to emphasize that aggressive, fair enforcement of section 404 is one of our top priorities, and it is from that perspective that I have consulted with the Corps of Engineers as it has developed its revisions to the 1980 proposed regulations. I support what the corps is doing and speak today in support of those proposed revisions.

The most widely heard criticism of the program has been that it often takes too much time to secure a permit, as Mr. Dawson mentioned. The principal thrust of the proposed new regulations is to streamline the regulatory process, and I believe the proposed changes in the regulations presently under discussion will achieve this important goal.

Thank you for the opportunity to appear, Mr. Chairman.

Senator CHAFEE. If these regulations go into effect, will there be no amendments needed to the Clean Water Act in your judgment?

Ms. DINKINS. We are not, at this time, discussing amendments to the Clean Water Act. We have not proposed any.

Senator CHAFEE. Thank you very much, Ms. Dinkins.

Mr. Ray Arnett, Assistant Secretary of Interior.

Mr. Arnett, we welcome you here.

STATEMENT OF G. RAY ARNETT

Mr. ARNETT. Thank you, Mr. Chairman.

I appreciate the opportunity to share this panel with my colleagues and appear before you today to discuss the proposed regulations of the Corps of Engineers relating to its regulatory permit program.

We understand, as you pointed out, that the proposed regulatory changes were approved yesterday by OMB as an interim final rule and that this means that when they are published in the Federal Register, there will be a request for additional comments. This will give the Federal agencies involved an opportunity to provide additional comments on these procedures.

As you know, the Department strongly supports efforts by the corps to simplify and expedite the regulatory permit program. We believe that implementation of adequate regulations, together with the ongoing regulatory reform effort, will go a long way toward improving current program difficulties.

We support, in particular, efforts to require that most permit decisions be made within 60 days. We also strongly support the decision to encourage preapplication consultation on major applications, because we view this as a valuable means of reducing costly delays in processing corps permits.

I would like to discuss our overall view of the 404 program. Such a discussion is valuable in providing an appropriate perspective for the relationship between the 1980 proposal and the program as a whole.

In our view, the most significant aspect of the corps' regulatory permit program relates to the responsibility of the Fish and Wildlife Service, mandated by a variety of laws, to provide Federal leadership to conserve, protect and enhance fish and wildlife and their habitats for the continuing benefit of the nation. Those species of primary concern to the Service, pursuant to statutory mandate, are migratory and endangered species. Their well-being depends to a great extent upon the quality of the Nation's waters and associated wetlands. Thus, in its efforts to protect the Nation's waters and wetlands for fish and wildlife purposes, the Service contributes to the overall goal of the Clean Water Act—the restoration and maintenance of the chemical, biological, and physical integrity of the Nation's waters.

The Service's directives under this program can best be accomplished by providing on a timely basis to the Corps of Engineers its comments and recommendations on the review of activities requiring a permit. Through this process, the rate of unnecessary conversion of wetland habitats to other uses and unnecessary degradation of water quality has been slowed considerably. We also strive to insure that adequate mitigation is provided.

Section 404 itself specifically mandates the involvement of the Service in the permitting program carried out by the corps. Various provisions of the section provide for involvement in the development of general permits, assumption of the 404 permitting program by the States, and perhaps most importantly, commenting on individual permit applications made to the corps. Section 208(i) of the act also provides specific funding for the Service's national wetlands inventory and provides that inventory information be provided to the States for use in the development of their dredge and fill regulatory programs.

Generally, the Service comments on individual permits following the issuance of public notification by the corps. After investigating the proposal and taking into consideration the concerns of other Interior agencies, the Service provides a report to the corps containing the Departmental recommendation. This comment process is directed in part by a Memorandum of Agreement with the corps, containing specific timeframes and procedures for elevating disagreements to insure the smooth functioning of the review process. The previous MOA, dated March 24, 1980, has been revised as of July 2, 1982.

As with any regulatory program of this magnitude, there have been problems. They have been primarily due to delays in permit review and inconsistencies in the procedures and policies followed by the involved Federal agencies. Consequently, one of the early commitments made by this administration was to improve implementation of this program, with an eye toward facilitating balanced development while at the same time protecting the Nation's aquatic resources including wetlands. This commitment is now being brought to fruition with the completion of two major processes.

The first is the publication by the Corps of Engineers of revised regulations for its permitting program. The second process is the review of the program by Vice President Bush's Task Force on Regulatory Reform. The task force's report, published on May 7, 1982, focuses on five major reform efforts: First, reducing uncertainty and delay in the permit review process; second, encouraging States to assume control of the 404 program; third, reducing conflicting and overlapping policies; fourth, expanding use of general permits; and fifth, clarifying the jurisdictional scope of the program. Some of these objectives will be met with the implementation of the revised corps regulations, and others will be addressed in further regulations.

We are confident, based on our close working relationship with the corps and Assistant Secretary Gianelli, that we will be appropriately involved in all future regulatory efforts.

Moreover, I am pleased to say that the Service, in cooperation with the corps and other Federal agencies, has already begun to take steps to improve the administration of its program responsibilities. For example, the Service has achieved success with the use of joint interagency permit processing. This concept, as employed by about one-third of the corps districts, improves interagency coordination through the use of periodic meetings between the corps and involved Federal and State agencies to review and report on permit applications.

This process has reduced both the time and paperwork required to process applications in these locations. Preapplication consultation, a procedure whereby complex projects are reviewed during the early planning stages, already occurs in many areas. Use of this practice is further encouraged by the revised corps regulations. The recently implemented MOA with the corps, mentioned a moment ago, is designed to reduce the number of referral levels, thereby expediting review of controversial permits.

Overall, Mr. Chairman, the effort by the executive branch to bring about the efficient administration of this program is well underway, and we look forward to working with the corps, EPA and other Federal agencies to reduce the regulatory burden on the public without sacrificing important natural resource values.

Thank you, Mr. Chairman, and I will be happy to answer any questions, and I do have members of my staff here who will be able to assist me.

Senator **CHAFEE**. Thank you very much, Mr. Arnett. I know you have been, and the Secretary also, very concerned about our national wetlands. We have some questions which we will be getting into, but why don't we take Dr. Hernandez' statement.

We are delighted to see you again.

Dr. **HERNANDEZ**. Good morning, Senator Chafee, and Senator Gorton.

I do have with me today Mr. Paul Cahill, who is in charge of the Office of Federal Activities that handles the day-to-day activities on these 404 permits, and will help us with some of the technical issues involved.

Senator **CHAFEE**. We know Mr. Cahill. We welcome you back, Mr. Cahill.

Dr. **HERNANDEZ**. I have a very short statement I would like to read. There is a little bit of redundancy of the other statements.

Senator **CHAFEE**. I think it is important. You proceed. We have enough time.

STATEMENT OF DR. JOHN W. HERNANDEZ, JR.

Dr. **HERNANDEZ**. I am pleased to be here today to discuss the Army Corps of Engineers' proposals to amend its permit regulations for managing certain types of activities in the waters of the United States.

As the committee requested, I will focus my statement on the relationship between EPA's responsibilities under section 404 of the Clean Water Act and the Corps of Engineers' permit regulations.

I would like to preface my remarks by emphasizing that EPA understands and appreciates the reasons why, in the Clean Water Act, Congress established an inter-agency framework for regulating the disposal of dredged and fill materials. When not managed properly, these materials can have unacceptable adverse environmental effects on the Nation's waters. The strong administrative capability and field network of the Corps of Engineers, along with the environmental resources of EPA, and the consultative ecological expertise of the Fish and Wildlife Service and the National Marine Fisheries Service, work to provide an effective interagency program for evaluating and regulating dredge and fill operations. The Agency has three objectives in this effort: First to maintain and where possible enhance the level of protection the program affords our Nation's waters——

Senator CHAFEE. Don't go too fast. I want to follow this. As a matter of fact, I am behind you already.

Dr. HERNANDEZ. This protection is what you already addressed this morning, Senator Chafee. It was reinforced in Secretary Arnett's testimony.

Second is to transfer responsibility for providing protection of these resources to the States wherever practicable, and third, to put into effect EPA's programs in a way which does not impose unnecessary regulatory burdens imposed by the program. EPA will continue to work cooperatively with our sister Federal agencies as it carries out its assignment.

EPA's authority under this program derives from several sections of the Clean Water Act. First and most important is section 404(b)(1), which directs EPA to develop, in conjunction with the Secretary of the Army, environmental guidelines for the specification of disposal sites. These guidelines serve as the basis for evaluating the physical, chemical, and biological effects of discharges of dredged or fill material on this country's aquatic resources.

EPA devotes resources to review thousands of 404 permit applications annually. EPA reviews these permit requests and consults with the corps to insure consistent application of and compliance with the 404(b)(1) guidelines. In addition, section 404(b)(1) guidelines are used to develop effective general permits and serve as baseline criteria for permit issuance under approved State programs.

Under section 404(c), the EPA Administrator has the final authority to restrict or prohibit the use of a specific site for disposal of dredged material if it would result in an unacceptably adverse impact on municipal water supplies, shellfish beds, fishing, wildlife or recreation areas. The Administrator may invoke this authority after consulting with the Secretary of the Army and providing notice and opportunity for public hearing on the question of environmental impacts.

Another major Agency role derives from the addition by Congress in the 1977 amendments of sections 404 (g) through (l), which establishes a system for State assumption of the dredge and fill program. In response to the 1977 congressional mandate, EPA promulgated regulations which establish the requirements for State assumption and which specify the role of EPA in overseeing approved State programs.

Congress also added section 404(q) in 1977 which directs Federal agencies to enter into agreements to insure efficient operation of the program. Pursuant to this provision, the Administrator of EPA and the Secretary of the Army signed a memorandum of agreement in March 1980, which was recently revised July 7, 1982.

Over the last 5 years, the program established under these provisions in cooperation with the corps has contributed to meeting the objective of the Clean Water Act. Water quality has benefited from 404 reviews of proposed discharges of contaminated materials, from the protection afforded for those wetlands which filter and take up pollutants in runoff before they reach our streams and rivers, and from permit conditions that reduce sedimentation and turbidity which would otherwise result in bottom deposits.

During this period, however, it also became apparent that the goals of the program were not always being achieved as efficiently as possible, and that there was room for improvement. To address identified problems, the Vice President established an interagency task force in August 1981 to evaluate existing regulations policies and procedures of the 404 programs. Working closely with the corps and EPA, the task force developed a number of comprehensive regulatory reform measures which were issued on May 7, 1982.

EPA supports the five broad categories of recommendations developed by the task force. They include reducing uncertainty and delay in the permit review process; encouraging States to assume control of the 404 program; reducing conflicting and overlapping policies; expanding the use of general permits; and clarifying the jurisdictional scope of the program.

In implementing these areas of reform, EPA is working with the corps to review the 404(b)(1) environmental guidelines to simplify their application and to clarify the jurisdictional definition of "waters of the United States." In addition, the agency has undertake a careful reevaluation of the present state assumption regulations under section 404 (g) through (l) to encourage State transfer by removing obstacles.

As part of this review process, we will shortly be seeking public comment and recommendations.

With respect to section 404(q), EPA and the Army have recently signed a revised memorandum of agreement to eliminate uncertainty and delays in the permit review process.

Complimenting these reform efforts, the corps is working to complete revisions to its permit regulations under section 404. These regulations govern all aspects of the corps' regulatory program and include a number of nationwide permits.

The initial revision to these permit regulations were proposed by the corps on September 19, 1980. After I came to EPA in the spring of 1981, Major General Heiberg wrote to me concerning EPA's views on the revisions. I assured him of EPA's continuing commitment to work with the Department of the Army on these revisions. I emphasized the commitment of EPA Headquarters and regional office resources to working with the corps to insure that the objectives and requirements of the Clean Water Act are met, and that the proposed permits provide industry, business and individual applicants with complete and appropriate information needed to determine eligibility for permitting under the general permit program.

Under the aegis of the Vice President's task force, we have worked with the Corps of Engineers and other agencies to implement the reform measures I have mentioned. We look forward to working with the corps to achieve further progress under the 404 program.

As has been noted, the corps' proposed regulatory changes were approved yesterday by OMB as an interim final rule. This means that when they are published in the Federal Register, there will be a request for additional comments. This will give EPA and other

Federal agencies involved an opportunity to provide additional comments on these procedures.

This concludes my testimony, Senator Chafee. I will be happy to answer any questions which you may have.

Senator CHAFEE. We will take a 10-minute break and be back.

[Brief recess.]

Senator CHAFEE. We apologize for the interruption. I am afraid there are going to be some more. I suspect there will be lots of votes this morning.

Mr. Arnett, I was interested in your testimony, and you heard the testimony of Mr. Dawson. I would be curious as to what your thoughts are on the proposal which is considered by Mr. Dawson to be a minor one, to exempt all waters that have a flow of less than 5 cubic feet per second, of any size, forgetting the 10-acre limitation that was previously in there.

Could you give me your thoughts on that?

Mr. ARNETT. Mr. Chairman, when this administration came into office, the only thing that we had to refer to were the 1980 preliminary regs. At that time, I think it was General Heilberg, asked us whether we had any comments on that proposal. As I recall, in about January of this year, I wrote a letter to Mr. Gianelli to indicate that the Department of the Interior does not support the expansion of the nationwide permit program as outlined in those 1980 proposed regulations. We want to encourage and to lessen as much of the burden to the permittee as possible. We have heard that under the current nationwide permit program there has been only insignificant damage to wetlands. We don't know whether that is true or not true.

We feel the corps has a unique ability to monitor these wetlands. I would favor expansion of any of the nationwide permits if we can assure ourselves we would have no detrimental impact on wetlands. At this point in time, I must say we would oppose expansion of the nationwide permits.

Senator CHAFEE. Have you seen the regulation?

Mr. ARNETT. I have not.

You mean the new ones?

Senator CHAFEE. Yes, the proposed ones.

Mr. ARNETT. I can ask the staff if they had a look at it. I am sure we haven't evaluated it. We have just had them for the last week or so, or maybe less than that.

Senator CHAFEE. Mr. Dawson, what seems to be the rush here? Why are you plunging ahead? What is the hurry? How long are they? I understand they are 300 pages?

Mr. DAWSON. No, sir, I don't believe they are quite that long. They are more like 200.

Mr. Chairman, this 10-acre point that you are raising is not a new part of these proposals, but has been in the proposal all along.

Senator CHAFEE. You mean in the proposal of 1980?

Mr. DAWSON. Yes, sir.

Senator CHAFEE. This is what Fish and Wildlife had to say. This was in December 1980, obviously before Mr. Arnett got there:

> This entire program should have been subject to the NEPA review process before promulgation of the proposed nationwide permits as required by the Council and Environmental Quality NEPA regulations, so that the public could comment on the

proposed permits with the benefit of the NEPA documents. We are opposed, however, to issuance of nationwide permits for categories of waters. In our view, activities authorized by the nationwide permits for categories of waters would generate significant impacts and are not necessarily similar in nature.

In other words, there is a difference between activities—farming, woodland, and categories of waters. In this you are clearly moving into categories of water. Is that not true?

Mr. DAWSON. Yes, sir.

Senator CHAFEE. Where do you get the authority to do that?

Mr. DAWSON. Sir, again, this decision is based on all of the comments that we received both from Interior and many others from our own field experts who believe that the protections are still in the program. I think it is important to say we have not exempted these from 404. We couldn't do that. What we are saying is these are permitted under the national permit in this case, but that there are still adequate means to remove a particular activity or a particular body of water from the permit if it is shown there genuinely are significant environmental concerns.

Senator CHAFEE. Here is a quote from Interior:

> Further, it is our opinion that nationwide permits for categories of water are not provided for in the Clean Water Act.

What do you say to that, Mr. Arnett?

Mr. ARNETT. Mr. Chairman, if I may defer for just a moment, I wanted to get back to an earlier point.

Senator CHAFEE. Sure.

Mr. ARNETT. My efficient staff brought me this January letter to which I referred. To answer your first question, our specific statement at the time, January 8, 1982, to Mr. Gianelli was that—

> The Department of Interior recognizes uses of nationwide permits is necessary in reducing regulatory burdens on the public and that they can be instituted with minimal impact on natural resources.
>
> Accordingly, we support the 24 nationwide permits and activities but with the caveat that the District Engineer retain discretionary authority as proposed by the Corps in September 18, 1980, Federal Register.
>
> To issue regional or local conditions on Corps permits as determined necessary where it has been demonstrated that the aquatic environment is not adequately protected by a nationwide permit. In addition, with respect to the nationwide permits, No. 17, 12, and 23—

This refers to another letter—

> We would support the delegation only so long as existing section 404(b)(1) guidelines are applicable to the delegation. We do not support the expansion of nationwide permits for categories of water to include all isolated lakes and additional wetlands greater than 10 acres.
>
> We believe nationwide permitting should be developed on the basis of activity rather than type and size of the body of water.

Senator CHAFEE. I couldn't agree with you more. I have no objections to the activities. You have had activities before. But the corps is plunging into a new area when they get into categories of water. So you disagree, obviously, based on your January letter.

Mr. ARNETT. Yes.

Senator GORTON. What happens? Have you met with Mr. Gianelli? Apparently they are proceeding regardless of what you think.

Mr. ARNETT. I would like to stress the degree of cooperation and contact we have had with Secretary Gianelli and Mr. Dawson. They have listened to our concerns and we are confident that we have a close working relationship with the corps. They, like we, are confronted with a lack of manpower to do all the things that are required by the Congress and by legislation, and they are trying to shortcut without short circuiting any of these total programs.

I am optimistic we can work with the corps in developing meaningful 404 permit regulations and I feel that I should give some credit in your presence, Mr. Chairman, to the corps, for the working relationship that we have developed.

Senator CHAFEE. I am not here to knock the corps. I think the corps, in this program, up to the last year or so, has been doing well. I am concerned about these regulations. And so are you, judging by the letter you wrote in January.

Now what has changed to make you believe that their getting into categories of waters is all right?

Mr. ARNETT. I don't think that is all right. As I pointed out in our original letters, and I still stick to that position, we don't believe the size is as important as the activities on that particular water. I believe the corps has the unique capability that blends well with the Fish and Wildlife Service to protect wetlands as intended by Congress and I feel that the corps is genuinely concerned. If I may be so bold as to say so, it has been my contention for a long time that the Congress has not spoken clearly on whether they want to protect wetlands or not.

The Clean Water Act is many faceted and if I were in the corps' shoes, I would view my responsibility as protecting clean waters. The Department of the Interior, particularly our professionals in the Fish and Wildlife Service, also look at this act as giving them the opportunity to protect wetlands that are so important as nurseries for shellfish, anadromous fish, and other fish as habitat for migrating waterfowl, and as breeding grounds for aquatic insects important to the entire environment.

Congress has said many times that wetlands are important, we have to save them, but they have never said it specifically with regard to section 404 of the Clean Water Act. The corps is doing their thing and I don't think wrongly so, in trying to expedite what they perceive to be their total responsibilities in expeditiously processing permits. They are going down one path while the Fish and Wildlife Service is attending to what they feel is their responsibilities, going down the parallel path.

Often it is difficult to get together on how important one is to the other. I think Congress should perhaps be more specific in whether they do or do not want to protect wetlands. If they do, they should say so very loudly and clearly and give the direction to everybody concerned that wetlands are of primary importance.

We think they are very primary. We feel these 70 million acres are worth protecting and preserving, if we are going to maintain the wildlife resources we feel the people of America want.

I am not opposed to what the corps is trying to do in their area of framework. Sometimes we are coming from different sides. We are adding apples and oranges and trying to do it in the same piece of legislation.

Senator CHAFEE. I'm not sure I agree with you. You have the objectives of the act, which I cited in the opening statement, which is to restore and maintain and both you and Mr. Hernandez in your statements referred to the biological integrity of the Nation's waters.

Mr. ARNETT. Yes, sir.

Senator CHAFEE. We cannot, by statute, define exactly every aspect of the wetlands, but here is one Member of Congress speaking right now on the subject and obviously in your reading of it, not only in 1980, but in your 1982 letter, it is your opinion that nationwide permits for categories are not provided for in the Clean Water Act.

What we are trying to do is slow the Corps of Engineers down, slowing Mr. Dawson down. I think what he is attempting to do—he can brush over it—these waters over 10 acres, in my judgment, are extremely significant to the wildlife of the country. You must agree to that.

Mr. ARNETT. They are significant to us, too, and like I pointed out in my testimony and January 1982 letter to Mr. Gianelli, we are opposed to that.

Senator CHAFEE. You are opposed to it. What can you do about it?

Mr. ARNETT. I think we can continue to work with the corps. We would be perhaps more confident with the expansion of nationwide permits if a monitoring procedure had been implemented. I do not know that this has been done in the past. I assume there has been some of that done, but I do not know that our people have had an opportunity to review the results of that monitoring to see if there have been any deleterious effect to wetlands as a result of the existing nationwide program. I would be reluctant to expand the program before I knew what kind of effects the current nationwide permits for waters 10 acres and less have had.

Senator CHAFEE. I agree with you, I think that makes sense.

Mr. Dawson, what do you say to that, here you are, plunging ahead. Have you got any report on the effects of less than 10 acres? These regulations were to become final today, weren't they?

Mr. DAWSON. Yes, sir, but I think it will be next week. They are already at the Federal Register for printing. I guess they will take effect the date they actually appear.

Senator CHAFEE. It is my understanding that these regulations were to become final and there is a decision, recently made, to make these interim?

Mr. DAWSON. Yes, sir.

Senator CHAFEE. How long ago was that decision made?

Mr. DAWSON. That was made yesterday.

Senator CHAFEE. What is happening around here? Why is the freight train moving so fast? Are you just neglecting the comments of Mr. Arnett's division?

Mr. DAWSON. No, sir. I would like to state again, as I did in my opening statement, that we considered very carefully the views of Interior and EPA.

Senator CHAFEE. How many meetings did you have with Interior?

Mr. DAWSON. Well, meetings at which this segment came up, I really couldn't count.

Senator CHAFEE. Ten, three, or one? I am not asking specifically, but roughly.

Mr. Arnett, have you met frequently with Mr. Gianelli?

Mr. ARNETT. I have talked to Mr. Gianelli on the phone.

Senator CHAFEE. Have you ever met him?

Mr. ARNETT. I know Mr. Gianelli very well. I have known him for 30 years. He was director of water resources in California when I was Director of Fish and Game. We had some differences of opinion in some areas then. We were able to, on most occasions, resolve our differences amicably and we could disagree without being disagreeable. I feel very comfortable with Mr. Gianelli.

Senator CHAFEE. I think Mr. Gianelli is a very fine person. No question about that.

Mr. ARNETT. I feel, sir, the corps is genuinely concerned about the nationwide loss of wetlands, but I am not sure the way they are approaching the nationwide permits issue is the way we would recommend. As I pointed out, I would like to see the results of monitoring in the past and then if there is no indication of damage, maybe we could then accept expanding the program.

Our people believe the revised program would exclude the Great Salt Lake because it is an isolated body of water. We just are not comfortable with what has been proposed at this point in time, but we are not opposed to trying to expedite the program with a more general permit.

Let me ask our staff if they met with the corps on these regulations?

Mr. MORIARITY. Not on these specific issues.

Mr. ARNETT. The staff said they did not meet with them.

Senator CHAFEE. This is an Alice in Wonderland. Here these regulations are extremely important. Furthermore, it is my understanding that even though they are now changed to interim, that that is just a big word for final. You can receive comments from Fish and Wildlife or Congress, or anybody, but there is no requirement you act on them, is that correct, Mr. Dawson?

Mr. DAWSON. Yes, but if I may point out, again, we are talking about proposed regulations that are nearly 2 years old and certainly the corps has spent hours on top of hours reviewing, considering, and genuinely considered the views of the other agencies, as well as the public.

Senator CHAFEE. You didn't consider them very much. If you look at what they said 2 years ago, you may have considered them, but you rejected them.

Mr. DAWSON. In some cases.

Senator CHAFEE. And you weren't so concerned to bother to meet with them.

Mr. DAWSON. I think it might be worth noting that even in 1980, when the comments first came in from the other agencies, they were very supportive in many respects, and they had their differences, but——

Senator CHAFEE. Let's look and see what EPA had to say, Mr. Hernandez. Again, this is before you came in. Let's see what they had to say about those regulations, which Mr. Dawson suggested you were very supportive of:

> This provision, section 323.2(a), Waters of the United States, does not follow EPA's definition of the waters of the United States.

> The proposed expansion of this authority to allow issuance of a nationwide permit in classes of waters in addition to categories of activities has no statutory basis and is inconsistent with Congressional intent.
>
> We believe that the proposals to expand the scope of the 1977 nationwide permits by rescinding the 10 acre size limitations is not in compliance with section 404(e) of the Clean Water Act.
>
> There is no information in the proposal to indicate why the Corps thinks these nationwide permits would satisfy the requirements that activities covered by general permits have minimal environmental effects individually and cumulatively and in the case of 404 permits are similar in nature.

I don't know who you are getting comments from. Here are the two most affected agencies who are extremely critical.

Mr. DAWSON. Mr. Chairman, if I could point out that the regional conditioning which is a change in the permitting regulations was adopted in large measure because of the concerns that the Department of Interior and EPA raised and we looked on that as a very significant protection for just the concerns that you are expressing. I might note, too, in conjunction with EPA that their suggestion regarding waters of the United States, the definition was adopted 100 percent. The point I was trying to make is that while we have differences on some parts of these lengthy regulations, I think that is probably inevitable, the letter from Interior that came in also had the quote that "We concur with the Corps of Engineers' regulatory approach as it appears in the proposed regulations and support the objectives contained therein."

Granted after that they began to look at particular sections and raise real concerns. I want to, again, assure the Chairman that we took those concerns into great account and gave them very detailed consideration.

Senator CHAFEE. Dr. Hernandez, what have you got to say about all this? Do you stand by what EPA said in 1980?

Dr. HERNANDEZ. I think some of our most concerned comments, giving as an example the one you cited, that is a definition of the waters of the United States in the revised Corps of Engineers regulations, they have, in fact, taken our 404(b)(1) guidelines' definition of the waters of the United States. This is the framework of that whole jurisdictional issue as to what is to be covered by this.

I think they have done a good job in taking our definition. That was one of the serious ones you spoke to.

Senator CHAFEE. I don't think so. What I am talking about is the nationwide permits.

Dr. HERNANDEZ. Under the general permits issue.

Senator CHAFEE. That is right.

In 1980, EPA said:

> We believe that the proposal to expand the scope of the 1977 nationwide permits by rescinding the 10-acre size limitations is not in compliance with section 404(e) of the Clean Water Act.

Dr. HERNANDEZ. I haven't really focused on that 10 acre issue from our point of view.

Senator CHAFEE. How long have you had to look over these regs?

Dr. HERNANDEZ. We have had about 3 days. We made, I think, a very quick scan to find those key issues we were concerned with. I think one was the role of our 404(b)(1) guidelines, that is very important to us in this process.

The other is the definitions in terms of jurisdiction because we feel those are the two areas of greatest concern to us.

Senator CHAFEE. I must say, I cannot understand what the Corps of Engineers is doing. You put out these regulations which, in effect, are in final form. Dr. Hernandez had 3 days. How long has Interior had?

Mr. ARNETT. I think about the same time, sir. I think we got them earlier this week, Tuesday or so.

Senator CHAFEE. What kind of business is that, Mr. Dawson, 200 pages?

Mr. DAWSON. Mr. Chairman, our view, again, is that we are talking about a body of regulations that has been proposed since September 1980. The agencies had commented previously. We have been in contact since then. Our view was we did have to make a decision and move forward on these. There has been adequate comments. The points we are discussing today, Mr. Chairman, have all been made before in great detail. I do not believe anything can be pointed to that is new that we have not heard before——

Senator CHAFEE. But you just don't agree?

Mr. DAWSON. Yes, sir.

Senator CHAFEE. You have received their comments and that's that, glad to hear from you, Fish and Wildlife, but this is the way it's going to be.

Mr. DAWSON. Well, sir, I note, too, the public comments that we received, 84 percent of those comments were very supportive of the nationwide permit concept and what we have tried to do is balance all of those concerns and be as responsive as we could be.

I think, as Dr. Hernandez said, we really have looked in many areas to the concerns they have raised.

Senator CHAFEE. We will take a 10-minute break now while I go vote.

[Brief recess.]

Senator CHAFEE. Dr. Hernandez, the December 1980 comments from EPA, says:

> We believe the proposal to expand the scope of the 1977 nationwide permits by rescinding the 10 acres size limitations is not in compliance with section 404(e).

Now 404(e) talks about the minimal impact on the environment. My question to you is, do you believe that what the Corps of Engineers is proposing under these regulations conforms with 404(e) in that it has minimal impact and particularly because I am referring to the abolition of the waters under the nationwide permit as suggested here?

Dr. HERNANDEZ. Senator, there are places in the United States where, in the aggregate, that rule might have a significant impact. I think that might be bona fide where you have an aggregate wetlands, it is a very important part of it—duck flyways, something like that—because, in the aggregate, smaller than 10-acre ponds would be a very important element, while some isolated small potholes in some other part of the United States may not be important at all. It may be de minimis and not have any impact.

Senator CHAFEE. So, in other words, some of them obviously would have more than minimal impact?

Dr. HERNANDEZ. I think the best way to handle that would be the regional conditions of permits so that a general permit that might apply across the United States in some way, when it comes to, say, I think one of the ones you cited was the North-Central part of the United States, where they have many small lakes in Minnesota and places like that, regional conditions would require that the general permit go through some other kinds of criteria, some other kinds of permit review before they were issued in that section of the country.

Senator CHAFEE. Mr. Dawson, the regional suggestion that Dr. Hernandez had, do you have that in your regulations?

Mr. DAWSON. Yes, and as I pointed out——

Senator CHAFEE. Is it a requirement or a suggestion? How does that work?

Mr. DAWSON. It is not a requirement, but it is a capability that the Division Engineer will have, and I am, again, convinced the corps will take this responsibility very seriously to condition the nationwide permit in regions where the damages may be shown to be significant.

Senator CHAFEE. You think all that can be met under your 60-day requirement?

Mr. DAWSON. Yes, sir.

Senator CHAFEE. Let's take a statement that EPA made, again, in 1980:

> Initial estimates made by the U.S. Fish and Wildlife Service from a publication entitled "Wetlands Inventory of Pennsylvania" reveal there are more than 73,000 acres of wetlands in the Greater Pocono Mountain region of Pennsylvania alone. Significant percentages of those 73,000 acres are within the areas now proposed for inclusion under the nationwide permit program.

So what your proposal encompasses is truly nationwide. It isn't merely some potholes in North Dakota or even the Minnesota Lakes. It goes all over the country, including my State of Rhode Island, where you cut the coverage in half.

The coverage now encompasses 85,000 acres, and it drops to 45,000 under your proposal.

Mr. DAWSON. Mr. Chairman, again, the coverage, I think it might be stated we are not talking about exempting or removing from coverage the permit program. As I mentioned, this is not a new concept because the head water and isolated water permits, except for the 10-acre lakes, have been in effect since July 19, 1977, and the other agencies have endorsed that approach. We believe, again——

Senator CHAFEE. The other agencies have endorsed what approach?

Mr. DAWSON. The previous, above the head water and isolated water, below 10 acres, and I believe that has been done in testimony before this committee.

Our view is we are extending that concept of categories in a way that will be shown to be acceptable, again keeping in mind any activity can be kicked out and made to go under the individual permit process, and we do think the regional conditions that you have alluded to will provide good protection.

Senator CHAFEE. Mr. Arnett didn't seem to agree with you.

Mr. **Arnett**. Mr. Chafee, I agreed with the original approach. What I am concerned about is that before we expand it we determine whether or not resources have been damaged. It would be much easier if we had developed data from monitoring on what has happened to those wetlands since 1977 to cause us to want to expand. I would be hard-pressed to expand any of these nationwide permits until I do know what had happened with the areas of 10 acres or less.

Senator **Chafee**. That is right. I agree with you. I can't understand why the Corps of Engineers, before they came forward with this extraordinary expansion, didn't have some evidence to show that, instead, they have complied with, what is it, 404(b), and the minimal impact. Why don't you do that, Mr. Dawson?

Mr. **Arnett**. I am sorry, you are asking Mr. Dawson. If you would like me to comment——

Senator **Chafee**. I am putting your question to Mr. Dawson. Here you are seeking this extraordinary expansion, and you can dismiss it as just nationwide, and anybody can complain if they want, and then it can be retracted, but that is not so easy, and then the damage is done, why don't you see what your experience has been under the present exemption that you currently have?

Mr. **Dawson**. Well, sir, we feel we have done that. I think that is a good point, and we think the experience has been successful, and what we have done is remove the burden of the regulatory program in a way that has been acceptable and we are continuing to discharge our responsibilities with the water quality.

Senator **Chafee**. Ms. Dinkins, do you think they have the power to do this?

Ms. **Dinkins**. Yes, I believe——

Senator **Chafee**. Under 404(e), is it?

Ms. **Dinkins**. Yes; under 404(e), the language talks in terms of activities being subjected to general permits, or as we are discussing here, nationwide permits. The way that I think this proposal, which has really been in the regulations themselves since 1977, fits into 404(e) is that what they are covering by this general permit are those categories of activities that occur within those categories of waters.

Senator **Chafee**. Say that again? Go through that a little slower, I missed that.

Ms. **Dinkins**. What is covered by the general nationwide permit here are the categories of activities that occur in those waters.

Senator **Chafee**. That is right. There is no argument here about activities. We have been doing that since 1977, farming, and I guess routine roadbuilding, but how do you stretch that to waters?

Ms. **Dinkins**. Because it is the activities within those types of waters that are covered by this general permit.

Senator **Chafee**. I must say that is an extraordinary jump. I can't make it.

Ms. **Dinkins**. Mr. Chairman, it is a matter of semantics, and I think what it is is whether the activities involve just fill or activities that involve pipelines including fill or activities that involve fill that is for a road, or fill that is for a dam, or fill that is for erosion control, all of those activities, no matter what they are, because they occur in that category of water, would be covered by the nationwide permit.

What you have here is not a difference in approach, not a difference in principle, because if you looked at the very first page of the regulations that have been in effect since 1977, they have the same approach, which is a general nationwide permit for categories of waters, those above 5 cubic feet per second head waters and those that are isolated lakes less than 10 surface acres.

That is the principle we are talking about here.

Senator CHAFEE. What you are saying here is because you have exempted less than 10 acres, and I don't know whether anybody has ever challenged that——

Ms. DINKINS. I don't know that that has been challenged. I don't believe it has been.

Senator CHAFEE. Now, you are saying, because you are able to do that now you are making your next big jump, is that correct?

Ms. DINKINS. What I am saying, sir, the principle is the same principle. Now, you have to go a step further and look at the fact that these activities within these categories of waters have to meet the conditions that are established by the regulation itself, and it also refers to the best management practices that are laid out in the regulations so that they are not totally unregulated by virtue of being subjected to this nationwide permit, or general permit, and then you add on there the ever-present discretion of the District Engineer to determine that a particular activity in this area needs to be subject to an individual permit or this additional provision that within a given region or area, the District Engineer can establish the specific conditions on the nationwide general permit within that area.

Senator CHAFEE. Let's take a case. Explain to me how this is going to work. You give a nationwide permit for, in effect, these ponds that have no flow of water. Then along comes somebody and drains the pond, or the swamp. Now, what happens? You are saying the Corps of Engineers can intervene in specific instances. What can they do?

Ms. DINKINS. Mr. Chairman, can I change your hypothetical because I am not comfortable with that one, and have someone come in and fill the pond, rather than drain it, so we know clearly what is the discharged fill material.

Senator CHAFEE. OK.

Ms. DINKINS. If it were, say, a pond of 2 acres——

Senator CHAFEE. No, 50 acres.

Ms. DINKINS. If it is a 50-acre pond, I think the Corps of Engineers could very easily, in that instance, conclude that that may have an adverse effect on waters of the United States and declare that that needs to be subject to an individual permit. Or it may be——

Senator CHAFEE. It falls under the nationwide permit?

Ms. DINKINS. Yes, but they could still conclude that the activities should be subjected to an individual permit. It would have to come to the corps attention while the fill was going on, or after it was completed for the corps to come back and say that it should have been subject to an individual permit.

Senator Chafee. I'm sorry, I missed something. Did you say when it comes to their attention?

Ms. Dinkins. Yes.

Senator Chafee. Meanwhile it is filled?

Ms. Dinkins. Well, that could happen, yes, sir.

Senator Chafee. Doesn't that give you concern?

Ms. Dinkins. It has been my experience with the corps and with activities of this nature that they have generally been able to determine in many instances where there is an activity under way that should be subject, or is subject to their permit power. They work very closely with the resource agencies and the resource agencies frequently advise them if they believe there is a project that should be monitored by the corps.

Senator Chafee. What deeply worries me here is that Mr. Dawson and his superior came into office dedicated to changing this program, and Mr. Gianelli's efforts have been, it's no secret, he doesn't like the 404 program. Mr. Arnett says Congress should speak clearer on the 404 program. Well, we think Congress has spoken clearly and what we are attempting to do, and this committee has spoken clearly, we don't approve of what is being attempted under these regulations, nor does the Department of Interior.

I find it extremely difficult to understand, Mr. Dawson, why you do not have some studies made of what has been the effect of the permits you have had so far, the exemptions you have had so far.

Let's just read the law:

> 404(e). In carrying out its functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice and opportunity for hearing, issue general permits on a state, regional or nationwide basis for any category of activities involving discharges of dredge or fill material. If the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effect when performed separately, and will only have minimal cumulative adverse effects on the environment.

Now, you are not doing that.

Mr. Dawson. Sir, I would differ and assert that we are doing that, and I think the so-called kick-out provision Assistant Attorney General Dinkins referred to, where the corps can pull an activity out from under the nationwide permit is really a protection to make sure it stays minor and similar.

The corps I think, over the last 5 years, has shown that they are serious about doing that kick-out procedure in appropriate cases. In fact, above 5 CFS, above the head waters, under 10 acres, quite a number of individual permits have been required and I am sure will continue to be required. So our view is we certainly take issue with the law as you read it, but we feel very strongly that we have, in fact, complied with that.

Senator Chafee. Dr. Hernandez, what about requiring an environmental impact statement on these regs?

Dr. Hernandez. I think any general permit has to have an environmental impact statement, doesn't it? No?

Senator Chafee. On the regs themselves.

Dr. Hernandez. I guess an environmental assessment is what you have to have on regulations. I am just not really sure on that one. I am going to have to ask my expert——

Senator Chafee. Let's ask the lawyer.

What do you say, Ms. Dinkins?

Ms. DINKINS. Mr. Chairman——

Senator CHAFEE. On these regs which are involving thousands and thousands of acres of the country, millions of acres which Mr. Dawson in his comments indicated wasn't one of the major changes that was coming about under these regs that are proposed, you did not even point this out, Mr. Dawson, that this was a major change that you are proposing.

Mr. DAWSON. Mr. Chairman, I thought I had when I alluded to the expansion of the nationwide permits. You are absolutely right that I didn't allude to the specific nationwide permit that you have raised, but I did try, and if I did not raise it properly, then I apologize, but one of the two major changes that I alluded to in addition to the 60-day time was the expansion of the nationwide permit.

Of course, this is an example of that.

Senator CHAFEE. Ms. Dinkins, what do you think about getting an environmental impact statement on these new regs?

Ms. DINKINS. If these regulations, like others, are subject to NEPA, so that the corps would have to conclude this is not a major Federal action significantly affecting the quality of human environment, and I believe the corps did that assessment prior to concluding that it would promulgate these regulations——

Senator CHAFEE. In other words, the corps concluded this wouldn't have a major environmental impact.

Mr. DAWSON. Mr. Chairman, in addition, on each of the nationwide permits which are also susceptable to the same requirement, an environmental assessment was performed on each one of those.

Senator CHAFEE. Wait a minute. I am not sure I understand.

Mr. DAWSON. The nationwide permits, which are, of course, included in the regulations, each of them also require that an environmental assessment be done because they are, in effect, a permit themselves, and have to go through that process.

Senator CHAFEE. And based on the environmental assessment, you came to the conclusion it didn't have a major impact?

Mr. DAWSON. That's correct.

Senator CHAFEE. As I understand it, that is the first step in the process.

Mr. DAWSON. Yes, sir.

Senator CHAFEE. Do you agree with that, Mr. Arnett?

Mr. ARNETT. If I had been making an assessment, it probably would have been done differently.

Sir, I think the corps should be commended for publishing these regulations as interim final at this time because it is going to give the public and Federal agencies an opportunity to review these.

Getting back to the subject of regional conditioning, we have not yet seen what these regional conditions are. I think Ms. Dinkins said they would be imposed by the District Engineer, but it was my impression that the Division Engineer would impose them. We would prefer that the District Engineer make these conditions, I haven't read the regs, but I think the provision is——

Mr. DAWSON. Division.

Mr. ARNETT. We would like to have the opportunity to read those things thoroughly.

Senator **Chafee**. That seems like a modest request. I would think you should have.

Am I correct, Ms. Dinkins, that the term "interim final" is really no different than "final?" What it means is these regulations are set now?

Ms. **Dinkins**. These are final effective regulations, yes.

Senator **Chafee**. Why do they call them "interim final"?

Ms. **Dinkins**. With the designation of "interim," it is my understanding that that gives the opportunity for the Corps of Engineers to continue to review them, and puts the public on notice that they may, in fact, change them.

Senator **Chafee**. But at the same time, they are final?

Ms. **Dinkins**. Yes, they are effective and final at the same time because the corps will now proceed with the program, implementing the program under these regulations, but they are designated as interim regulations to indicate that they are considering additional comments on them.

Senator **Chafee**. Mr. Dawson, is that the way you do business? You say you have been back and forth with these things, kicking them around for quite a while, so you are just getting on with the job. At the same time, Mr. Arnett says he would like to take a look at them, which seems reasonable. How come you don't arrange that the people who are most affected, namely, Fish and Wildlife, and EPA, have copies of these regulations before they become final? They are final. We can call it interim final, but you don't have to do anything based on comments from Dr. Hernandez and Mr. Arnett.

Mr. **Dawson**. Mr. Chairman, our view was, and is, that the agencies have had ample opportunity to comment on these regulations. They have, in fact, been around for a long time, and our view is that at some point, and we can certainly debate about when that point arrives, but at some point, you have to move forward, or the process back and forth can go on interminably.

Our view, in fact—I have not heard any concerns this morning that have not already been expressed by the agencies. We, again, certainly give those full consideration.

Senator **Chafee**. Let me ask you this: You are brushing aside, it seems to me, the concerns of Mr. Arnett and Dr. Hernandez. Have you made any changes in the accommodation to their concerns since these were first discussed?

Mr. **Dawson**. Yes, we have. I have alluded to the regional conditioning that we put in specifically because of the concerns that they have raised, and I would like to mention a few others here, if we have the time. But I want to say we certainly have not brushed off, and don't intend to brush off the comments of either agencies. They have been very articulate in expressing their concerns, as well as very expressive in recognizing that we have some accommodations in these regulations to their concerns.

The EPA objections to proposed changes in the definition of waters in the United States, we adopted the EPA version on that. There was quite a bit of concern about wetland definition. We convened an interagency work group and agreed that changes should not be made at this time. There was an objection to deletion of the requirement notifying EPA of use of medium, rather than average annual flow to determine the head waters. And we added in response to that guidance in the preamble notifying EPA anytime they express an interest in a particular area. There was an objection. There are a number of other things here, concerns on the nationwide permits, I have mentioned that the regional reporting and the regional——

Senator CHAFEE. Mr. Dawson, those are fine, but obviously the major concern that both agencies discussed was 10 acres. If you considered it, you did not come down on their side, is that right?

Mr. DAWSON. Yes, that is right.

Senator CHAFEE. Dr. Hernandez, what are your views on 404? What is the objective of the whole section here?

Dr. HERNANDEZ. Clearly it is an integral part of the Clean Water Act that is totally aimed at protecting the waters of America and not just the waters flowing instream, but all the waters of America. I think our definition that has been incorporated in the corps regulations do include the waters of the United States. That is important and where I think the test has to come, and that is what we are looking at in general permits. We have things that cause minimal adverse impact and with respect to their cumulative impact, the word is in there, they may have minimal cumulative impact if you have all of these things generally permitted. The test for that has to be EPA's 404(b)(1) guidelines and that is the very next sentence in the section you read. I think if our 404(b)(1) guidelines are employed properly in the review of general permits, that we will eliminate one possibility of significant degradation of the waters of the United States.

Senator CHAFEE. When the corps proposes its nationwide permits, do you incorporate 404(b), the so-called guidelines?

Mr. DAWSON. Yes, we have in these regulations done nothing to diminish the impact of the 404(b)(1) guidelines.

Mr. Chairman, may I make one point on the timeliness point that you have raised? One of the reasons that we were interested in getting these regulations published after the long period that has elapsed since they were proposed is the existing nationwide permits, as you know, expire July 19 and we felt it was very important to get the extension of those, and the new ones into effect.

I might also point out that the 10 acre——

Senator CHAFEE. Do you have the power to extend those guidelines?

Mr. DAWSON. Excuse me, sir?

Senator CHAFEE. You say the nationwide permits expire on July 19. Do you have the power to extend those?

Mr. DAWSON. Yes, sir.

Senator CHAFEE. So really we are not working under a July 19 deadline.

Mr. DAWSON. But we have to do it through—we feel we need to do that through the regulatory process.

We felt we needed to get these out before that time or very close to that time.

Mr. Chairman, I would like to note, too, that the 10 acre concern was, in fact, a very important point made by the other agencies, but in our opinion, it was not the major concern that was raised.

There are many, many others, and I mentioned some of those, that we have taken care of.

Senator CHAFEE. It is a major one with me. It seems to me a major one with them based on the statements that I quoted to you.

One of the points that is constantly being made is that we are trying to get the States to assume this program. I would just like to ask Mr. Cahill a couple of questions.

My State has applied to assume this program. I checked on how the progress is coming along. It is my understanding that you were requested to approve the grant for them to implement their program on March 16th. On May 12, I learned that the grant had been approved. So they requested on March 16; May 12, you approved it.

As of yesterday, Rhode Island has not been notified that the grant has been awarded and Region I of EPA has no knowledge whatsoever about the grant. It is my understanding also that a check at EPA headquarters, there is not even a record of it in Washington.

How energetic is that in pressing to get the program down into the States?

Mr. CAHILL. I don't know what happened to the check. The paperwork has been out of my office as of the date that I notified you. I signed the award——

Senator CHAFEE. That was May 12.

Mr. CAHILL. Yes.

I left the country for a while, but I signed that and had it transmitted out of our office at that time.

Senator CHAFEE. Transmitted to whom?

Mr. CAHILL. It went into our contracts processing procedure at the agency. I have talked with your assistant here, and checked up on this, as well as another one which was delayed and tried to move both of them along. In previous years, 404 State-held grants were administered through the Office of Water. When the 404 national programs was transferred to my office, there were some problems with the authorization codes put on the fund that came to my office.

As of yesterday, I understand the proper waivers have been signed and the matter has been expedited so that within a day or two these matters will be transferred to the Treasury so they can issue the checks.

I wasn't aware of the technicality. The funds in my office now were not section 404 funds, which are training funds, and this function is kind of a training activity.

The assignment that was made in my office was Section 517 funds of the Clean Water Act. That is what was fundamentally holding us up. That cleared it up for me.

Senator CHAFEE. Mr. Cahill, I am not going to belabor this particular point. Presumably you have learned now the technique to move along these faster. It always seems to be the common complaint that the States are not assuming it and here we have an example where a State stepped forward and it has taken 2 months since approval came for them to get the money, and they haven't gotten it yet. I hope the process is now all organized so that States can be encouraged to come forward and once they have gotten their approval, they will get their money and can get underway.

Gentlemen and ladies, I just want to say I am deeply concerned about this program and what you are doing. I, as you know from discussions we have had before, am a fervent supporter of protecting the wetlands in our country. It is an interest that is shared by Secretary Watt, as he has spoken many times on this subject, by Dr. Hernandez and by Mr. Arnett. I think that the views of those affected agencies should be considered more than you have considered them, Mr. Dawson. And I am not sure of the legality of the way you are proceeding.

So, I would hope you bear those suggestions in mind as we proceed from here.

I thank you for coming.

Does anybody else have anything to say?

Mr. ARNETT. Thank you, sir, for giving us an opportunity to respond.

Dr. HERNANDEZ. I am sure we will be reviewing these regulations in detail and working with the Corps of Engineers.

Senator CHAFEE. I think that what should be done is before we plunge ahead, as Mr. Dawson is suggesting here in the nationwide permits on these waters, as Mr. Arnett is suggesting, you ought to find out what has been the effect of the prior exemptions, the prior permit exemptions, and have they had minimal effects, the less than 10-acre ponds, the less than 10-acre areas. Do you have any material on that, Mr. Dawson?

Mr. DAWSON. Sir, I think we certainly ought to do everything we can under the cost limitations that something like that might entail to learn as much as we can about the past and the prospective impact.

I would like to note that Bill Gianelli and I are not trying to do away with 404. What we are trying to do, as we have indicated before, is to make this program work better, to ease the significant regulatory burdens that are out there. That is all we are trying to do.

Senator CHAFEE. You come in with a crusader spirit, Mr. Dawson, and Mr. Gianelli, your boss, in making it easier, quicker to get these permits. That is not the purpose of the program. The purpose of the program is to save the wetlands in the country. It is not to get permits as fast as you can get them. Sometimes these permits cannot be acquired, processed as quickly as possible. I notice, I think what you say, 60 to 70 days average for the noncontested permit, maybe that can be speeded up, but the objective is to preserve the wetlands of the country. That is the purpose of the act.

Mr. DAWSON. We believe the objective of water quality can be met and still have the program work a lot better. That is what we are committed to do, not to forsake that requirement, but to make the program genuinely work faster and better.

Senator CHAFEE. I hope you will have as much enthusiasm for the water quality as you have for the speed of the permits.

Thank you very much for coming.

[Whereupon, at 12:40 p.m., the hearing was recessed subject to call of the Chair.]

[Statements submitted for the record follow:]

STATEMENT OF ROBERT K. DAWSON

DEPUTY ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS)

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

I. INTRODUCTION

I am pleased to come before you to discuss Army's views of our recent changes to Corps of Engineers' permit regulations. Mr. William Gianelli, Assistant Secretary of the Army for Civil Works regrets that he is unable to present Army's views personally. Secretary Gianelli is in the Republic of Panama this week chairing the quarterly meeting of the Panama Canal Commission.

We are also involved in other regulatory efforts such as new Memoranda of Agreement with other agencies to resolve differences in individual permit cases and new regulations which we hope to propose this fall to fully implement the decisions of the Presidential Task Force on Regulatory Relief. However, based on the request in the Chairman's letter of invitation to appear at this hearing, I will direct my testimony to the regulations proposed in September 1980 and the current status and effect of implementing them.

My remarks will address the following:

- The background of and need for new regulations.
- Significant and moderate changes to existing regulations.
- Public involvement.
- Impact of the regulatory changes on the program.

II. BACKGROUND OF AND NEED FOR NEW REGULATIONS

The rules and regulations which covered the Corps of Engineers' regulatory program for the past five years were published on July 19, 1977. Shortly after that, in December 1977, Congress amended the Clean Water Act and made extensive changes to Section 404. In 1978, the Corps drafted new proposed regulations to incorporate those amendments. Executive policies for water resources management were changing rapidly at that time. Additionally, the 1977 Amendments directed us to reach agreements with involved Federal agencies to streamline the Section 404 permitting process. These agreements took over two years to consummate. In order to incorporate the CWA Amendments, new policies, and the provisions of the new interagency agreements, publication of those regulations as proposed rule-making did not occur until September 19, 1980.

Along with the need to change the regulations to reflect the 1977 Amendments to the Clean Water Act, there are other reasons for improving the regulations. First, the Corps had found its nationwide general permit program initiated in 1977 to be an effective way for reducing regulatory burdens and desired to expand that program. Second, a number of other new laws, Executive Orders, judicial decisions, policy changes, and other agency regulations affecting the corps' permit program had taken effect since adoption of the present regulations on July

19, 1977. These included Executive Order 12044, Improving Government Regulations (now replaced by EO 12291) which required agencies to review significant regulations with a view towards simplifying them and making them less burdensome to the public. Those nationwide general permits issued by regulation on July 19, 1977, expire on July 19, 1982, and should be re-issued.

Finally, it is clear to us that this program is simply not functioning properly. I have a tabulation of some statistics here which I will submit for the record. It shows that, even in cases where there are absolutely no objections, permit processing time averages over two months and can run as long as six months. If any objections at all are raised, regardless of the merits of the objections, processing averages nine months. Where environmental impact statements are required, it takes an average of over two years and can take up to four or five years to get a decision on a permit application. Over 5,000 individuals and businesses annually are subjected to the major delays and an additional 10,000 or so experience unwarranted delays of several months.

	1981			1980		
	#	% of Total	Avg. Time	#	% of Total	Avg. Time
All permits	16,300	100	131	15,500	100	139
Permits without objections	10,900	67	68	10,600	68	76
Permits with objections	5,400	33	260	4,900	32	271
Permits with EIS's	30	1	815	46	1	768

There are instances which are all too common where private individuals have had to wait many months and even years to get a decision on a request for very minor actions on their own private property. In addition to private citizens, there are numerous cases where industry projects have been delayed for years causing economic losses which far exceed the value, tangible or intangible, of any resource protection gained by the delay.

III. SIGNIFICANT AND MODERATE CHANGES

There are twenty-five "moderate" changes, 17 of which will provide regulatory relief and two "significant" changes which provide most of the regulatory relief. These are: (1) requiring most permit decisions to be made in sixty days; and (2) expanding the nationwide permit program. The advantages of all the changes are to reduce many of the delays and duplications which have plagued the program and in the long term, free up scarce staff resources to allow the Corps to execute other important aspects of the program more effectively.

I will briefly discuss several of the moderate changes which are being made in the regulations:

A section is added to clarify and define what activities were exempted from the 404 program under Section 404(f). EPA also has the call on defining the exemption under the 1979 Attorney General opinion and has approved this section.

Procedures for pre-application consultation on major applications are added. While this will add burdens on the Corps, it should produce a net benefit to applicants for major projects by reducing post-submittal processing delays.

Division engineers are given the authority to add regional conditions to nationwide permits. This is a new concept that will require added Corps effort but is seen as an appropriate way to maintain an effective nationwide permit program while still providing appropriate protection to the nation's waters.

Where other required authorizations have been denied or where navigation will clearly be impaired, district engineers are given the authority to deny permits without public notice.

Permittees receiving notification of suspension procedures are given the opportunity to request an informal meeting rather than or in addition to a public hearing. This could substantially reduce the costs and delays of public hearings associated with permit suspensions.

Permit revocation authority is lowered from the Chief of Engineers to the original permit decision authority (almost always the district engineer). This will reduce paperwork and enable quicker stopping of permitted work in the rare cases where termination or reversal is clearly needed to protect the public interest.

The requirement to coordinate all violations with Federal and state resources agencies is made optional.

Most violations are minor and need not be subject to delays and paperwork associated with interagency coordination. The significant violations will continue to be coordinated since the resources agency views are needed to find the best resolution of the violation. This change will free enforcement personnel for more important needs (surveillance, restoration plans, and consistent enforcement). It will also significantly speed up processing of minor violations.

We have adopted a concept of general permits for state programs which duplicate the Federal program, provided that the resulting activities have individually and cumulatively minimal impacts. However, absent evidence to the contrary, there will be a presumption that activities which comply with rigorous state regulatory standards in fact have minimal impacts. This will significantly reduce delays and paperwork in those states which have well developed regulatory programs.

Language is added to limit requests for additional information once an application is considered complete. An applicant should not be subjected to repeated time-consuming requests for additional information. In addition, the Corps and other Federal agencies will have to refine the application form to insure the appropriate, but minimum, amount of information is requested at the outset of the process.

The new law requirement will be added (Section 404(a)) that public notices be issued within 15 days of receipt of a completed application. This requires more intensive staff effort from the Corps but substantially reduces process times.

Finally, five existing nationwide permits for specific activities are reissued, six existing ones are expanded in coverage and fourteen new ones added.

IV. PUBLIC INVOLVEMENT

In reaching decisions on the final version of these regulations, we subjected the proposed regulations to extensive review, evaluation, and modification. We received over 400 letters comprising thousands of pages of comments including several hundreds of pages from other Federal agencies covering the full spectrum of reaction from strong opposition that the regulations were too environmentally oriented, to strong support for a balanced program, to strong opposition that the regulations were too development-oriented. On balance, the public comments were favorable. We convened a work group of about 20 of our most seasoned regulatory experts as a balanced interdisciplinary team to review every comment. The major issues were identified and evaluated and policy positions recommended. Based on a work group recommendation, we held two public hearings during June 1981 in Washington, D.C. and St. Paul, Minnesota. Hearing testimony was synthesized into the work group recommendations by a smaller work group and decisions were reached on how the final regulations should be structured.

It is noteworthy that the regulations proposed in September 1980 have been subsequently modified in many minor ways and in two major ways, all of which have strong support in the public record. The major changes are to reduce the target for average processing time for most permit applications from 105 days (90 days from date of public notice) to 60 days from receipt of application and to authorize division engineers to modify nationwide permits to better account for regional variations in potential impacts.

V. IMPACT OF THE REGULATORY CHANGES

I will now discuss the impact of the changes on the regulatory program.

As pointed out there are many small but cumulatively significant program changes which will improve the Corps execution of the program without sacrifice to the protection of the nation's waters. We are not reducing the environmental or other factors which a district engineer must consider when making a public interest decision. Instead, we are taking those steps necessary to make the system more responsive to the regulated public and provide an applicant with a decision in a reasonable period of time. We are trying to operate within the goals established by the Congress in Section 404(q) of the Clean Water Act. The reduction in delays will save millions of dollars as individuals and businesses do not have to wait as long to obtain a decision on their permit application and can begin receiving benefits from their projects much sooner if their applications are approved. The regulated public will also receive a much better response from their government, something they rightly deserve.

The expansion of general permits will reduce the intensity of Federal control over many activities when that control has been found to be not needed due to the minor and similar nature of the activities or when the control is already being adequately exercised by local, state, or other Federal agencies. Corps resources which are freed from the unnecessary processing of individual permits can be diverted to quality management and control of the more significant water resources activities. Further, the enforcement and surveillance programs will be shored up with resources diverted from the processing of individual permits. For those instances where activities are already being regulated by others, the reduction in duplication can also generate significant savings. One estimate finds that the average cost of processing a single individual permit is $2,500. Duplicating this cost at two or more levels of government is simply not good government. I believe that programs which complement, not duplicate, one another will not only save time, money and reduce paperwork but will help restore faith in government and foster a better partnership among local, state, and

Federal water resources protection agencies.

In summary, I believe that these regulations represent a good first step in making the Corps' regulatory program more responsive to the public interest. These regulations contain many changes, which individually represent only minor impacts on the program. However, taken together they will greatly improve program execution while still protecting the nation's waters.

The proposed regulatory changes were approved yesterday by OMB as an interim final rule. This means that when they are published in the Federal Register there will be a request for additional comments. This will give the Federal agencies involved an opportunity to provide additional comments on these procedures.

Thank you for the opportunity to discuss this important matter with you, and I am prepared to answer any questions you may have.

STATEMENT
OF
CAROL E. DINKINS
ASSISTANT ATTORNEY GENERAL
LAND AND NATURAL RESOURCES DIVISION

I appreciate the opportunity to appear before the Subcommittee as it considers the Clean Water Act's Section 404 program. Since a significant part of my private practice before I came to the Department involved Section 404, I believe that I have a working knowledge of the Section 404 program and a sense of where it works well and where it needs to be improved. I have also maintained a close familiarity with the Corps' Section 404 litigation during my tenure at the Department In fact, in the nine month period since October 1981, the Department of Justice has received 80 dredge and fill enforcement referrals */ from the Corps, and I am pleased to inform the Subcommittee that we have just settled the largest and most environmentally significant Section 404 case ever brought. **/ In this settlement, which involves a large tract of land on the Florida panhandle, approximately 8,000 acres of damaged or destroyed wetlands will be restored, and pollutants from approximately 14,000 acres of farmland will be diverted into a settling pond for purification before discharge into the Apalachicola River. In addition to the sheer magnitude of this restoration, the largest ever implemented, significant pollution reduction benefits will accrue to the Apalachicola basin, one of the most productive shellfish nurseries in North America.

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*/ For the year beginning October 1980, the number of dredge and fill enforcement referrals was 120.

**/ United States v. J. Tollie Murff, et al., No. MCA 80-0223 (N.D. Fla. Panama City Division).

I mention this settlement as background to emphasize that aggressive, fair enforcement of Section 404 is one of my top priorities, and it is from that perspective that I have consulted with the Corps during its consideration of the September 18, 1980 proposed revisions to the permit regulations. I support what the Corps is doing and speak generally today in support of the proposed revisions, which have been formulated over the last several months.

The most widely heard criticism of the Section 404 program has been that it often takes too much time to secure a permit. A principal thrust of the proposed new regulations is to streamline the regulatory process to ensure that permit decisions are made more quickly. I believe that the proposed changes in the regulations and a more streamlined interagency Sectin 404(q) agreement, presently under discussion within the Administration, will achieve this important goal.

The Secretary and the Corps have consulted closely with the Department and have been receptive to our comments.

While I appreciate this opportunity to speak before you on this important matter, I cannot address the specifics of the Corps' proposal. As you know, this Department generally does not comment on proposed regulations since we serve as litigation counsel for the various departments.

Although I cannot discuss the specifics of the Corps' proposed revisions, I will endeavor to answer any other questions the Subcommittee may have.

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